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Supreme Court, U.S.
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In The

Supreme Court of the United States

COMMUNITIES FOR A GREAT NORTHWEST and NORTHWEST MINING ASSOCIATION,

Petitioners,

v.

ED ARGENBRIGHT, COMMISSIONER OF POLITICAL PRACTICES of the State of Montana, and MIKE COONEY, SECRETARY OF STATE of the State of Montana,

Respondents,

and

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND, and CITIZENS FOR 1-125,

Respondents-Intervenors.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Whether the Ninth Circuit's decision permitting a ballot initiative to remain law, notwithstanding the District Court's factual finding that the government coercively suppressed virtually all political speech opposing passage of that initiative, conflicts with this Court's decisions commanding zealous protection of free speech.

2. Whether the District Court had the discretion under the First Amendment to refuse to invalidate a ballot initiative election, given that Court's factual finding that the government coercively suppressed virtually all political speech opposing passage of that initiative.

LIST OF PARTIES

Communities for a Great Northwest is a non-profit, non-partisan grassroots organization. Northwest Mining Association is a non-profit, non-partisan trade organization incorporated under the laws of the State of Washington. Both were Plaintiffs before the U.S. District Court for the District of Montana in CV-98-00037-CCL and Appellants before the U.S. Court of Appeals for the Ninth Circuit in Case No. 99-35032.

Montana Mining Association, Golden Sunlight Mines, and Yellow Band Gold, Inc., were Plaintiffs before the U.S. District Court for the District of Montana in CV-98-00037-CCL. These parties were not Appellants before the U.S. Court of Appeals for the Ninth Circuit. Continental Lime, Inc., was a Plaintiff before the U.S. District Court for the District of Montana in CV-98-00037-CCL and an Appellant before the U.S. Court of Appeals for the Ninth Circuit in Case No. 99-35032.

Respondents named herein are joined in their official capacities and were Defendants before the U.S. District Court for the District of Montana and Appellees before the U.S. Court of Appeals for the Ninth Circuit.

Respondents-Intervenors named herein were Intervenors-Defendants before the U.S. District Court for the District of Montana and Intervenors-Appellees before the U.S. Court of Appeals for the Ninth Circuit.

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OPINIONS BELOW

Review is sought of the opinion of the U.S. Court of Appeals for the Tenth Circuit, *Montana Chamber of Commerce, et al. v. Argenbright, et al.*, 226 F.3d 1049 (9th Cir. 2000), affirming the opinion of the U.S. District Court for the District of Montana. The Ninth Circuit's opinion appears at pages 1 to 30 of the Appendix. The opinion of the District Court for the District of Montana, *Montana Chamber of Commerce, et al. v. Argenbright, et al.*, 28 F.Supp.2d 593 (D. Mont. 1998), appears at pages 42 to 60 of the Appendix (referred to as App.).

JURISDICTION

The Supreme Court of the United States has jurisdiction to hear this case under Article III of the United States Constitution and has the power to grant *certiorari* under 28 U.S.C. § 1254. The judgment sought to be reviewed was entered on September 26, 2000, by the U.S. Court of Appeals for the Ninth Circuit.

CONSTITUTIONAL PROVISIONS INVOLVED

This Petition for *Writ of Certiorari* involves the First and Fourteenth Amendments to the United States Constitution. The First Amendment provides, in pertinent part, "Congress shall make no law . . . abridging the freedom of the speech, or of the press, or the right of the people peaceably to assemble . . . . " The Fourteenth Amendment

provides, in pertinent part, "[n]o State shall . . . deprive any person of . . . liberty . . . without due process of law."

STATUTES INVOLVED

The statues involved in this petition are Montana state ballot initiatives I-125 and I-137. The former was codified at Mont. Code Ann. § 13-35-227, but has been held unconstitutional on its face. App. 67. The latter has been codified at Mont. Code Ann. § 82-4-390. App. 68.

STATEMENT OF THE CASE

In this case, the Ninth Circuit failed to rectify a district court's inexplicable failure to protect political speech during an election campaign. The consequence of this failure is that Montana citizens are suffering daily under a law that passed only after the state government coercively and selectively suppressed virtually all opposition to passage of that law.

More specifically, the State of Montana used a selective gag law to suppress the free, political speech of the opponents of a complex ballot initiative during the months preceding the election in which that initiative was adopted. During those months, furthermore, the state allowed the promoters of the initiative to campaign unfettered. Montana thereby dictated which view of the initiative the electorate was permitted to hear. Consequently, the electorate went to the polls knowing only one side of a very difficult issue. They did not know the views of the initiative's opponents.

Judge Lovell of the United States District Court for the District of Montana properly held that the gag law was unconstitutional on its face. App. 38. He also held that the principal opponents of the initiative had been denied the right to free, political speech until just prior to election day. App. 57. Despite this holding, however, Judge Lovell let the ballot initiative go to a vote and become law. App. 10, 39, 40-41. Later, both he and the Ninth Circuit refused to set the results of that vote aside. App. 20, 60.

The ballot initiative in question is Montana's I-137,[1] which purports to prohibit certain mining practices ("mining initiative"). App. 5. Assessing the desirability of this law involves complex issues of economics and environmental science and several Montana entities opposed it because, as Judge Lovell observed, it "could put them out of business." App. 57. Several other Montana groups opposed it because the groups were composed of persons whose employers could be "put [ ] out of business." These opponents included Communities for a Great Northwest and the Northwest Mining Association (collectively, "the Communities"), Petitioners in this case.

In Montana, however, it was illegal for the Communities to campaign against the initiative because of the selective gag law: section 13-35-227 of the Montana Code.[2] Under this gag law, no corporation or organization financed by corporations was permitted to make any

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[1] Now codified at Mont. Code Ann. § 82-4-390. App. 63.

[2] The gag law passed as ballot initiative I-125 in Montana's November 1996 election. I-125 amended Mont. Code § 13-35-227.

contribution or any expenditure in connection with any political campaign regarding any ballot initiative (with certain exceptions not applicable here). *Id.* Violation of the gag law subjected would-be political activists to personal liability in the form of severe fines. Mont. Code Ann. § 13-37-128. App. 68.

In February 1997, soon after the gag law went into effect, the Montana Chamber of Commerce ("the Chamber") filed suit challenging its constitutionality. App. 8. The case was assigned to Judge Lovell. While that suit was pending, the Montana legislature actually intensified the gag law's coercive, selective suppression of free, political speech. Montana House Bill 575, effective April 1997, made it illegal not only for corporations, but also for partnerships, cooperatives, non-profits, and other organizations to contribute to ballot initiative campaigns. App. 46. In February 1998, Judge Lovell held this expansion unconstitutional but left the original gag law in effect, pending trial. *Id.*

The drafters and proponents of the mining initiative then maneuvered to bring it to a vote while the gag law still stifled virtually all opposition to it. On May 18, 1998, the proponents obtained the necessary permission from the Montana Secretary of State (the "Secretary") to solicit signatures on a petition to place the mining initiative on the November 1998 ballot. Because of the gag law, the Communities were unable to resist these efforts. On July 16, 1998, the Secretary certified the mining initiative for inclusion on the ballot. App. 8.

Until the Secretary put the initiative on the ballot, the Communities had been content that the Chamber, in its pending suit, adequately represented their interests in the protection of free speech. The new mining initiative threatened the Communities' interests much more gravely and directly than did the gag law alone, however. Therefore, the Communities hastened to join the battle against the gag law and on September 1, 1998, filed their complaint in the present case. This new case, too, was assigned to Judge Lovell. App. 8.

In their complaint, the Communities sought a declaration that the gag law was unconstitutional. App. 83. They also sought "such preliminary injunctive relief as may be requested by separate application therefore." *Id.* Three days after filing their complaint, the Communities filed a motion for preliminary injunction seeking two forms of relief. First, the Communities sought exemption from the gag law so that the Communities could exercise their constitutional right to educate Montana voters regarding the mining initiative before election day. Second, in case the exemption was not granted, they asked for an injunction blocking a vote on the mining initiative. App. 87. On September 18, 1998, Judge Lovell consolidated the Communities' case with the Chambers' case and combined the hearing on the motion for injunction with the bench trial already scheduled for mid-October. App. 33. Judge Lovell sat as the trier of fact in both proceedings.

At the close of the trial, on October 22, 1998, Judge Lovell ruled from the bench that the gag law was unconstitutional on its face. App. 38. Although there was still plenty of time to enjoin voting on the mining initiative,

however, Judge Lovell declined to provide any further relief to the Communities or to the voting public. Instead, he held that the Communities' motion for preliminary injunction was "premature" and denied it. App. 39. Further, Judge Lovell held that the Communities had not yet lost at the polls, so they were not yet injured. He therefore suggested that the Communities return to court if the election were to go against them. App. 38-39. "[W]ho knows," he mused, the Communities "may be able to persuade the people" after all, and if so, "then there is nothing for the courts to rule on." *Id.*

By the time Judge Lovell finally invalidated and barred enforcement of the unconstitutional gag law, the richly financed, non-profit proponents of the mining initiative had been campaigning aggressively for several months. During that entire time, they were unfettered by the gag law, unchallenged by any coordinated opposition, and unopposed in their advocacy. The Communities, in stark contrast, had been unconstitutionally muzzled for all that time. They now had only eleven days to counteract the effects of their prolonged, state-coerced silence; to provide the voters of the entire state of Montana with the suppressed, complex facts about the mining initiative; and to sway the opinions of voters who had heard but one voice on the subject for months. Not surprisingly, the Communities' and other opponents' efforts failed on election day, November 3, 1998. The mining initiative passed by a margin of 53 to 47 percent, according to the Ninth Circuit (though the actual margin was narrower).[3] App. 10.

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[3] In reality, the margin of victory for the mining initiative was markedly narrower than the 6 percent difference (53

Following Judge Lovell's suggestion, the Communities went back to him on November 12, 1998, by which time no doubt remained that they had been "injured," even in Judge Lovell's view. In a second motion for an injunction, the Communities asked Judge Lovell to block official certification of the mining initiative vote count so as to prevent the initiative from taking effect as law. App. 112-113. In spite of his previous holdings, however, Judge Lovell denied this motion and offered as his only stated rationale that he had already denied the Communities' first motion. App. 10, 40-41. Judge Lovell further stated that, in denying the first motion, he had promised "a later opinion and order would fully set forth [the court's] findings of fact and explain its ruling." *Id.* He thus indicated that he would eventually explain his refusals to

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percent minus 47 percent) the Ninth Circuit cited. Fed. R. Evid. 201(b)(2) permits this Court to take judicial notice of actual election results. *Badillo v. City of Stockton, Cal.*, 956 F.2d 884, 887 n.1 (9th Cir. 1992) ("We have held that election results are an appropriate subject of judicial notice."); *Jenkins v. Red Clay Consol. School Dist. Bd. of Educ.*, 4 F.3d 1103, 1124 n.19 (3rd Cir. 1993). According to results published by the State of Montana, voters actually cast 169,991 ballots in favor of the initiative and 155,034 ballots against it, a margin of 14,957 votes. http://www.state.mt.us/sos/assets/elections/98gen/98gen.htm. Therefore, a change of only 7,479 out of 325,025 votes cast, or 2.2 percent, would have changed the result (*see id.*) without even accounting for the get-out-the-vote campaign Mr. Anderson prescribed (*see infra*, Part I(B)(2)). Further, more than twice as many counties rejected the initiative as accepted it, and the counties that rejected it did so by an average margin of 19.5 percent as compared to an average margin of acceptance of only 11.9 percent. *See id.*

grant the Communities any protection from the predictable effect of Montana's protracted, selective, coercive denial of their constitutional right to political speech. But Judge Lovell never did.

Instead, when Judge Lovell handed down his final opinion in this case one week later, it contained only this single statement about the mining initiative: "the court denies the Plaintiffs' preliminary injunction motion as to [the mining initiative] because the relief sought was premature as of the close of evidence." App. 60. The opinion contained no hint of the promised explanation of his failure to prevent the initiative from going to a vote or from becoming law once that vote had taken place.

The Communities appealed this inconsistent series of orders and denial of relief, but the Ninth Circuit merely compounded the error. Though a panel of the Ninth Circuit properly affirmed that the gag law was unconstitutional, its decision contained only three short paragraphs devoted to the mining initiative. In those few lines, the panel held "the question of whether [the] preelection request for injunctive relief should have been granted" was "moot." App. 19-20. Writing for the panel, Judge Rymer asked instead "whether the district court erred in refusing to invalidate the election" after the mining initiative had passed. Although his holding is largely unexplained, he seems to have held there was no error because there was evidence the gag law did not affect the Communities' ability to campaign, or that, if the gag law had such an effect, then eleven days was enough time for the Communities to recover. Further, he seems to have held that even if eleven days were not enough time for the opponents to recover from the gag, then holding a

fair, special election would be too expensive. App. 20. None of these findings is supported by reference to evidence, by citation of significant authority, or even by argument. Like the District Court orders they uphold, Judge Rymer's findings are but raw conclusions.

The state defendants sought rehearing and the Ninth Circuit ordered the Chamber and the Communities to file briefs in opposition to that request. The Ninth Circuit denied rehearing by Order dated February 20, 2001. App. 65-66. The Communities now petition this Court for *certiorari*.

REASONS FOR GRANTING THE WRIT

The decisions of this Court make clear that an electorate fully informed by free, political speech regarding all sides of a given ballot issue or candidate is a prerequisite for preservation of democracy. Such speech is among the most inviolable of constitutional guarantees. Consequently, the failure by the courts below to provide for an informed electorate in the adoption of a ballot initiative in Montana intolerably conflicts with the teachings of this Court. *Certiorari* is therefore necessary to rectify this conflict and the resultant constitutional injuries inflicted by the State of Montana on the Communities and all other citizens of Montana.

In addition, the Ninth Circuit's decision allowing the District Court to leave the mining initiative in effect conflicts with other circuits' decisions in like cases. Other circuits require district courts to invalidate elections

when plaintiffs show a reasonable possibility that a constitutional violation has affected the outcome of an election. Such a possibility clearly exists in this case. *Certiorari* is therefore required to resolve this conflict and to clarify that district courts have no discretion under the First Amendment to refuse to invalidate elections that could reasonably have been affected by suppression of political speech.

I. Allowing A Ballot Initiative To Become And Remain Law Despite The Government's Coercive Silencing Of The Initiative's Opponents Intolerably Conflicts With This Court's Command To Provide For An Informed Electorate By Zealously Protecting Political Speech.

In this case, the trier of fact unequivocally held that the State of Montana had completely "deprive[d]" the Communities of the ability "to communicate their political views" and "political ideas" to the electorate. App. 57. Further, the State of Montana continued to suppress the Communities' political speech until just days before the vote on a ballot initiative that "could put them out of business" (and their employees out of work). *Id.* Nevertheless, the Ninth Circuit allowed the initiative to remain law based on the assumption that either the gag law had no effect, that eleven days time was enough to recover from that effect, or that an untainted election would be too expensive. These holdings conflict with this Court's clear and longstanding rulings that political speech is among the most fundamental of constitutional

guarantees, is necessary for the preservation of liberty, and therefore is to be protected with utmost vigor.[4]

A. This Court Commands Zealous Protection Of The Right To Free Political Speech Because An Informed Electorate Is Necessary For The Preservation Of Democracy Itself.

Freedom of speech and freedom of the press are essential to the preservation of our constitutional system because if the public were permitted to hear only one side of any issue, then there would be little point in holding an election on that subject. Instead, this Court stated, "[d]emocracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates and issues." *Buckley v. Valeo*, 424 U.S. 1, 49 n.55 (1976). Properly bilateral debate is crucial, this Court has held, because "informed public opinion is the most potent of all restraints upon misgovernment." *Grosjean v. American Press Co.*, 297 U.S. 233, 251 (1936). Accordingly, "[t]he evil[ ] to be prevented [is] not the censorship of the press merely, but *any* action of the government by means of which it might prevent such free and general discussion of public matters. . . . " *Id.* at 249-50 (emphasis added). Echoing this Court, Judge

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[4] The constitutional protection of speech afforded by the First Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) (striking down Rhode Island ban on alcohol price advertising).

Lovell correctly found that "[f]reedom of speech regarding public affairs is one of the cornerstones of self-government[; a]nd self-government suffers when those in power suppress competing views on public issues from diverse and antagonistic sources." App. 59-60 (*quoting New York Times v. Sullivan*, 376 U.S. 254, 266 (1964), and *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (internal quotation marks omitted).

This Court's holdings in this regard are numerous, consistent, and unmistakable. *See, e.g., Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (the "right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society"); *Williams v. Rhodes*, 393 U.S. 23, 32 (1968) ("[c]ompetition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms"); *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) (First Amendment protections "are not for the benefit of the press so much as for the benefit of all of us[; a] broadly defined freedom of the press assures the maintenance of our political system and an open society"); *Garrison v. State of Louisiana*, 379 U.S. 64, 75-76 (1964) ("speech concerning public affairs is more than self-expression; it is the essence of self-government"); *Associated Press v. United States*, 326 U.S. 1, 20-21 (1945) ("[the First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public"); *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 143 (1943) (though "unconventional ideas might disturb the complacent," freedom of speech is "essential if vigorous enlightenment [is] ever to triumph over slothful ignorance").

Moreover, these First Amendment protections have two sides: each individual's freedoms of speech and of the press are entwined with society's interest in hearing that speech and receiving the information communicated by the media. "The Constitution often protects interests broader than those of the party seeking their vindication," this Court noted, and "[t]he First Amendment in particular serves significant societal interests." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). In fact, this Court has recognized that the electorate's interest in hearing free speech so as to become informed about the issues to be decided is even more important than the right to speak itself:

> It is the viewers and listeners, not the right of [speakers] which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by [other lawmakers].

Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 390 (1969) (internal citations omitted). Quoting this Court's decision in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994), Judge Lovell himself found, as a matter of law, that "[t]he purpose of the First Amendment is to allow 'each person [to] decide for him or herself the ideas and beliefs deserving of expression, consideration and adherence.' " App. 59 (brackets in original).

Therefore, suppression of political speech cannot be permitted and, when found, cannot go unrectified. This Court explained clearly that the government "is constitutionally disqualified from dictating the . . . speakers who may address a public issue" because "[s]uch power in government to channel the expression of views is unacceptable under the First Amendment." *Bellotti*, 435 U.S. at 784-86. Consequently, as this Court concluded long ago, "the door barring federal or state intrusion into this area cannot be left ajar: it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests." *Stanley v. Georgia*, 394 U.S. 557, 563 (1969). In practice, these holdings mean that "[e]specially where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended." *Bellotti*, 435 U.S. at 785-86 (footnote omitted). "As [this Court's] cases have held," therefore, "it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status." *Anderson v. Celebrezze*, 460 U.S. 780, 792-93 (1983). Judge Lovell accepted the binding nature of these holdings in finding that "the First Amendment seeks to 'protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society.' " App. 59 (*quoting McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995)).

Consequently, when the courts below allowed the mining initiative to become and remain law despite that

the State of Montana had coercively suppressed political speech about one side of the issue, the courts below created a clear and intolerable conflict with the decisions of this Court. *Certiorari* is necessary to resolve this conflict.

B. The State Of Montana Coercively Prevented The Opponents Of A Ballot Initiative From Expressing Their Political Views And Prevented The Electorate From Being Informed Of Those Views.

Despite the decisions of this Court commanding that liberty be protected by guaranteeing free speech, the State of Montana coercively prevented the opponents of a ballot initiative from expressing their political views to the electorate until eleven days before the election. Such were the factual findings of the District Court. Furthermore, all evidence in this case shows that eleven days was not nearly enough time for the Communities to recover from the effects of the gag law. The Ninth Circuit, however, made its own *de novo* finding of fact that the gag law did not actually silence the Communities, and that, even if it did, eleven days was enough time to recover. Those findings directly contravene the record and violate the rules of civil procedure.

1. The District Court Unequivocally Held That The Initiatives' Opponents Were Completely Silenced Until Just Eleven Days Before The Election.

Judge Lovell had held flatly that "[t]he corporate voice [was] *silenced*." App. 57 (emphasis added). Judge

Lovell went on to hold that the gag law completely "deprive[d] corporations of the ability to communicate their political views during ballot issue campaigns" and deprived them of their ability "to communicate political ideas directly to the electorate." *Id.* He elaborated on this holding in unmistakable terms:

> [The gag law] *precludes* corporations from directly resisting potential laws that could put them out of business. Requiring shareholders to fight the corporation's battles is an *ineffective* and illegal substitution for corporate speech rights. Perhaps almost as important, [the gag law] *prevents* the electorate from being exposed to diverse viewpoints on public policy issues.

Id. (emphasis added). Having been "silenced" and thereby "preclud[ed]" from publicly expressing their views, the Communities could not have made themselves heard. Because they could not be heard, Montana had "prevent[ed]" the electorate from learning the other side of what should have been a wide open public debate regarding the mining initiative. These conclusions are Judge Lovell's findings as the trier of fact. Therefore, Judge Rymer's holding—that some evidence indicated the Communities could campaign even with the gag law in effect—has no basis in the record (which explains why Judge Rymer cited no evidence). Therefore, Judge Rymer's false assertion that some evidence indicated the gag law had no effect cannot remove his holding from direct conflict with the decisions of this Court. *Certiorari* is necessary as a result.

2. The Uncontroverted Evidence Shows That Eleven Days Was Not Nearly Enough Time For The Opponents To Inform The Electorate About The Opponents' Views.

In the District Court, Jerome Anderson, a highly qualified expert in ballot initiative campaigns,[5] gave greatly detailed testimony regarding what the Communities would need to do in order to plan and execute a campaign against the mining initiative. He concluded unequivocally that eleven days time was not enough to complete these tasks, and no one contradicted him. Nevertheless, Judge Rymer found, or at least implied, that eleven days time was enough and that therefore the mining initiative could remain law. Because the record completely contradicts Judge Rymer's conclusion about the adequacy of time to recover from the gag law, Judge Rymer's conclusion cannot support his holding. His holding therefore remains in direct conflict with the decisions of this Court.

The record reflects that Mr. Anderson has been an attorney, campaign manager, and politician in Montana for over fifty years. Moreover, he recently served as chairman and manager of two campaigns against Montana

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[5] Mr. Anderson's credentials and testimony were entered into evidence in the Chamber's case (*see* App. 50) and remained in evidence for purposes of the present case (*see* App. 102). Judge Lovell consolidated the Communities' case with the Chamber's case because, as he wrote, it "benefits the court since it provides the court with all evidence in both cases before deciding either. . . . " App. 32.

ballot initiatives, I-115 and I-122, the latter being a mining-related initiative like the one in this case. Mr. Anderson also served four terms in the Montana legislature, served as a precinct committee member, held various levels of offices at the county level, including county chairman, was legal counsel to one of the major parties in Montana, and served as vice chairman of a national political party. App. 92-94.

Mr. Anderson testified that a successful campaign against a ballot initiative requires a process of about twenty separate steps, beginning with the employment of a campaign manager. In any campaign, the manager must develop staff, employ consultants, and analyze the ballot issue itself. From there, the campaign must develop a budget and raise initial funds, then start polling. With poll results and other technical data in hand, the campaign must then develop its message and position statements, then test them in focus groups. Meanwhile, the campaign must detect and analyze the activity of the initiative's proponents. The campaign must identity supporters, set up campaign offices and hire more staff, then develop a grass-roots effort throughout the state. With all of these elements in place, the campaign must develop and hone its strategy and create an additional budget predicated upon all these factors. The strategy must include a schedule of events, including public appearances, media buys, and the like. It must also include organizing of opinion leaders across the state, securing of group endorsements, developing a speakers' bureau, and creating press kits. Campaign advertising plans must include not only buying media access (time for broadcast

media and space for print media), but also developing advertising content. At the end, there must be an effort to get out the vote. App. 96-99.

After laying out the necessary tasks, Mr. Anderson testified that eleven days time was not enough to accomplish them. "Using a week or ten days of television and radio time immediately before the election is not effective," he said. Instead, "[a] consistent television and radio campaign that is continued for at least *four weeks* is critical to the success of an election educational effort." App. 104-106 (emphasis added). Moreover, such a last minute blitz was not even possible because "TV time must be prepurchased as early as *90 days* before use in order to obtain effective spot placement." *Id.* (emphasis added). Given these constraints on timing and the need for all this organization, staffing, funding, and coordinated activity, every scrap of evidence in the record demonstrates that it was not possible to mount a campaign in eleven days. "It's too late to mount an effective campaign at this point in time," Mr. Anderson testified. *Id.*

Not one scintilla of evidence in the record contradicts any of Mr. Anderson's testimony. On the contrary, the expert called upon to defend the gag law testified on cross examination that, indeed, grass roots organization, endorsements from opinion leaders, speaking engagements, newspaper editorial support, advertising, and direct mailing are all factors in a successful campaign. App. 110.

Nevertheless, after Judge Rymer's failed attempt to show that the gag law did not really silence the Communities, he justified leaving the mining initiative in effect

by pointing out that "[e]leven days remained" between the election and the lifting of the gag law. This observation is completely unexplained in Judge Rymer's opinion except for an earlier reference to "countervailing equitable factors" that must be balanced against the constitutional violation. App. 19-20. In effect, however, Judge Rymer makes this timing observation as though it clearly shows, without more, that even if the gag law had actually prevented the Communities from campaigning, as Judge Lovell held, the Communities had enough time to recover from their long, coerced silence.

As detailed above, there are absolutely no grounds for concluding that eleven days was enough time to overcome months of coerced silence in a complex ballot initiative campaign. Indeed, the record mandates the opposite conclusion. Consequently, Judge Rymer's unexplained reference to the eleven days remaining cannot support his holding that the mining initiative should remain law. *Certiorari* is therefore necessary to resolve the conflict between Judge Rymer's holding and the decisions of this Court.

3. The Ninth Circuit's *De Novo* Finding Of Fact That The Opponents Could Mount An Effective Campaign In Eleven Days Violates Fed. R. Civ. P. 52(a).

Whereas Judge Lovell determined that the gag law prevented the Communities from campaigning and made no findings regarding whether eleven days was enough time to recover, Judge Rymer found that the gag law did not prevent campaigning and that eleven days time was

plenty. These findings are *de novo* factual findings that violate Rule 52(a) of the Federal Rules of Civil Procedure, as well as the decisions of this Court.

Judge Lovell unequivocally held that Montana had "silenced" the Communities. Writing for the Ninth Circuit, however, Judge Rymer held that "there was evidence" the gag law "had no substantial impact" on the Communities' "ability to campaign." App. 20. Judge Rymer then attempted to defend the District Court's decision by pointing out that the Communities had eleven days to mount a campaign against the mining initiative, implying that eleven days time was enough to overcome the gag law's effects. In reality, however, the record contains no evidence that the Communities could campaign despite the gag law, and not surprisingly, Judge Rymer cited none. On the contrary, moreover, all evidence in the record indicates eleven days was nowhere near enough time to mount a campaign.

Judge Rymer's *de novo* findings in this regard violate the rules of civil procedure and the holdings of this Court. This Court has long since made clear that an appellate court violates Fed. R. Civ. P. 52(a) if it makes *de novo* factual findings, even where, as here, the District Court judge was the trier of fact.

> In applying the clearly erroneous standard to the findings of a district court sitting without a jury, *appellate courts must constantly have in mind that their function is not to decide factual issues de novo.* If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it

> been sitting as the trier of fact, it would have weighed the evidence differently.

Anderson v. Bessemer City, 470 U.S. 564, 573-74 (1985) (emphasis added; internal citations and quotations omitted) (*quoting Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969); *citing United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949); *and see also Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1982)). Consequently, Judge Rymer's unsupportable factual conclusions do not remove his holding from direct and intolerable conflict with the decisions of this Court. *Certiorari* is necessary to resolve this conflict.

C. The Ninth Circuit's Reliance On "The Cost" Of Conducting A New And Constitutional Election As Justification For Leaving A Law In Effect That Passed In An Election In Which Political Speech Was Suppressed Conflicts Intolerably With This Court's Command To Protect Political Speech.

After his bankrupt attempts to affirm Judge Lovell's denial of relief on grounds of timing and lack of injury, Judge Rymer stated that Montana has an interest in "avoiding the costs of a special election." App. 20. He seems to have held, therefore, that even if the Communities did not have enough time to avoid grievous injury from the unconstitutional gag law, the Communities would just have to endure the harm for the greater common good because it would be too expensive to hold another election. That holding is absurd because even if a special election for the mining initiative were necessary

(and none is)[6], the injury is to the public and to constitutional democracy itself, not just to the Communities. Therefore, in light of this Court's clear command to protect political speech as the foundation of liberty, no strain on the guilty state's treasury could possibly justify suppression of viewpoints and creation of an uninformed electorate. Judge Rymer's holding intolerably conflicts

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[6] No special election is necessary for a ballot initiative, as opposed to an elective office, because an initiative can simply be placed on the next regularly scheduled ballot without leaving an office unfilled. This Court has recognized the existence of fundamental distinctions between candidate campaigns and ballot initiative campaigns. *Colorado Republican Federal Campaign Committee v. Federal Election Com'n*, 518 U.S. 604, 614-615 (1996). Candidate cases are different because courts are asked to take measures that would prevent a political office from being filled and would thereby prevent vital duties from being executed. In candidate cases, therefore, special elections must sometimes be held as soon as possible and at great cost. *See, e.g., Hadnott v. Amos*, 394 U.S. 358, 367 (1969) (ordering "state and local officials promptly to conduct a new election . . . for the various county offices contested by" the challengers). Here, though, no government or agency would be left headless in a time of crises; nor any crucial committee unbalanced by the absence of a legislator. No bill would go unpaid for lack of a comptroller, no alarm unanswered for want of a fire chief, nor any vicious dog uncaught. Instead of holding a special election, therefore, enforcement of the mining initiative could simply be enjoined until the initiative is placed on the next regularly scheduled ballot and voted on in the absence of the gag law. Alternatively, the Court could invalidate the election and allow the state to decide for itself whether a new, special election is necessary. *Marks v. Stinson*, 19 F.3d 873, 889-90 (3rd Cir. 1994) ("district court may simply invalidate the election, declare that there is a vacancy, and leave the decisions concerning a special election and the timing thereof to the appropriate state authorities").

with the decisions of this Court in this regard, and *certiorari* is necessary to rectify the error and to protect the Constitution.

II. *Certiorari* Is Required To Resolve The Conflict Among The Courts Of Appeals Regarding The Discretion Of District Courts To Deny A Remedy For Suppression Of Political Speech In Election Campaigns And To Place A Clear, Constitutional Threshold On That Discretion.

In addition to running afoul of this Court's command to protect political speech, the Ninth Circuit's decision conflicts with those of other circuits. Other circuits require invalidation of election results when it is reasonably likely that a severe constitutional violation affected the outcome. *Certiorari* is necessary to resolve this conflict. Furthermore, if it reasonably appeared to the courts below that the District Court may actually have had the discretion not to vacate the election, notwithstanding the suppression of political speech throughout the election campaign, then *certiorari* is necessary to clarify that the District Court had no such discretion. On a matter of such national importance, this Court should set a clear constitutional threshold for the vagaries of equitable relief.

A. Unlike The Ninth Circuit, Other Circuits Instruct District Courts To Invalidate Elections When Plaintiffs Show A Reasonable Possibility That A Severe Constitutional Violation Affected The Outcome.

It is well established among the circuits, including the Ninth Circuit (App. 20), that federal courts have the

discretion to invalidate state elections when "the election process itself reaches the point of patent and fundamental unfairness. . . . " *Gold v. Feinberg*, 101 F.3d 796, 801 (2nd Cir. 1996); *Touchston v. McDermott*, 234 F.3d 1133, 1145 (11th Cir. 2000); *Marks v. Stinson*, 19 F.3d 873, 888 (3rd Cir. 1994); *Bodine v. Elkhart County Election Bd.*, 788 F.2d 1270, 1272 (7th Cir. 1986); *Welch v. McKenzie*, 765 F.2d 1311, 1317 (5th Cir. 1985); *Hendon v. North Carolina State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983); *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978). Alternatively, as Justice Kennedy put it while serving on the Ninth Circuit:

> Federal courts will enter orders to invalidate state election results where voters have suffered an unconstitutional deprivation of the opportunity to vote even when it is not clear that the outcome would have been affected, but such relief has been reserved for instances of willful or severe violations of established constitutional norms.

McMichael v. County of Napa, 709 F.2d 1268, 1273 (9th Cir. 1983) (Kennedy, J., concurring) (*citing Griffin v. Burns*, 570 F.2d 1065, 1080 (1st Cir.1978)). Because a severe violation of the right to political speech was present in this case, the District Court indisputably had the discretion to invalidate the election. The question is whether the District Court had the discretion not to do so.

In other circuits, district courts have no such discretion. The Seventh Circuit, for example, instructed a district court that "[i]f the Plaintiffs . . . show a reasonable possibility that [a] sham candidacy affected the outcome of the election, then the district court should order new primary and general elections." *Smith v. Cherry*, 489 F.2d

1098, 1103 (7th Cir. 1973) (*per curiam*). The record in the present case clearly shows that the gag law violated the Constitution and had at least "a reasonable possibility" of affecting the outcome of the mining initiative election. According to the rule in other circuits, therefore, the District Court in this case was without discretion to let the election stand. Thus, by affirming the District Court's decision not to disturb this particular election, the Ninth Circuit created a conflict among the circuits as to the boundaries of district courts' discretion to deny relief for the effects of profound constitutional violations during election campaigns. *Certiorari* is necessary to resolve this conflict.[7] This Court has granted *certiorari* on such

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[7] Further conflict results from the Ninth Circuit's decision not to reverse the District Court for failure to analyze whether enjoining or invalidating the mining initiative election was a proper remedy. *Compare Gjersten v. Bd. of Election Comm'rs for City of Chicago*, 791 F.2d 472, 479 (7th Cir. 1986) (reversing order to hold special election because district court failed to analyze whether plaintiffs "demonstrate[d] that the unconstitutional practice had a significant impact on the particular election they [sought] to have invalidated"). Although Judge Lovell issued three orders in which he purported to address this relief issue, he never did. In the first order—before the initiative went to a vote—Judge Lovell held that the question of relief was premature because the initiative was not yet law. He therefore did not address it. In the second order—after the election—Judge Lovell held only that he had already denied relief. In the third order, despite that the election had already occurred and the initiative had become law, Judge Lovell simply repeated that the challenge was premature. Judge Lovell never cited any authority for these conclusions and never explained his logic. In fact, there is no logic here; the putative rationale is self-contradictory nonsense. The Ninth Circuit's decision affirming Judge Lovell's decision without comment on Judge Lovell's lack

grounds before. *Hughes v. W.M.C.A. Inc.*, 379 U.S. 694, 694-695 (1965) (reason for granting *certiorari*: "Both of these cases, today affirmed summarily by the Court, raise serious problems concerning the scope of the discretion of a federal court to fashion interim relief in state reapportionment cases, matters not hitherto decided by this Court.")

B. *Certiorari* Is Necessary To Set A Clear Constitutional Threshold On District Courts' Discretion To Allow Elections To Take Effect When Those Elections Could Reasonably Have Been Affected By Suppression Of Political Speech.

In light of this Court's decisions regarding the necessity of free speech for the preservation of democracy, it ought to be undisputed that an election is void when a state selectively suppressed political speech for virtually all of the campaign preceding that election. To whatever degree this proposition is subject to dispute, however, *certiorari* is necessary to resolve that dispute.

Three aspects of this case are not subject to serious dispute. First, selection of an equitable remedy, such as the prevention or invalidation of an election, is a matter for the discretion of the district courts. *Hathorn v. Lovorn*, 457 U.S. 255, 271 n.25 (1982) ("District Court simply might void the results of any runoff elections. . . . We, of

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of analysis therefore conflicts with the Seventh Circuit's decision in *Gjersten*. *Certiorari* is necessary to resolve this conflict, as well.

course, intimate no view on the best form of relief, leaving that matter to the District Court's discretion"). Second, the district courts' discretion is limited, and therefore suffers occasional abuse. *East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636, 639-640 (1976) (*per curiam*) ("[W]e hold that in shaping remedial relief the District Court abused its discretion in not initially ordering a single-member [voting district] reapportionment plan"). Third, the unconstitutional gag law in this case, having stifled one entire side of the debate for virtually the entire mining initiative campaign, had a "reasonable possibility" of "affect[ing] the outcome of the election." *Cherry*, 489 F.2d 1098 at 1103.[8]

Perhaps because of the clarity of this Courts' command to protect free speech, however, no case has ever presented such circumstances to this Court. As a result, some lingering uncertainty may remain as to the constitutional limits on district courts' discretion not to provide relief when selective, coercive suppression of free speech taints elections. *Certiorari* is necessary so that this Court

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[8] *See infra*, n.3; *Marks v. Stinson*, 19 F.3d 873 (3rd Cir. 1994) (affirming injunction preventing apparent election winner from taking office where "plaintiffs demonstrate[d] that the unconstitutional practice had a significant impact on the particular election they [sought] to have declared invalid"); *Coalition for Education v. Bd. of Elections*, 370 F.Supp. 42, 57 (S.D.N.Y.), *aff'd*, 495 F.2d 1090 (2nd Cir. 1974) (affirming order invalidating entire school board election where unconstitutional factor "could very well have modified the outcome of the election").

may clarify that an election must be enjoined or invalidated under such circumstances.[9]

CONCLUSION

A law remains in effect in Montana despite that its passage bore the poisonous taint of unconstitutional suppression of political speech. Further, that law continues to cause daily injury to those who—but for the abridgement of their participation in the electoral process—might well have succeeded in preventing the law from passing. To permit this situation to persist is to damage democracy itself. *Certiorari* is required to rectify this error by the Ninth Circuit and to make clear that no such corruption of the First Amendment will be tolerated.

Respectfully submitted,

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[9] The court need not necessarily order a special election, however, leaving that decision to the state. *See infra*, n.6.

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226 F.3d 1049

CAl. Daily Op. Serv. 7920, 2000 Daily Journal D.A.R. 10,517

United States Court of Appeals,
Ninth Circuit.

MONTANA CHAMBER OF COMMERCE; Sletten Construction; Lehrkind's Inc.; Kalispell Area Chamber of Commerce; Montana Hospital Association; Montana Farm Bureau; Montana Education Association, Plaintiffs-Appellees,

v.

Ed ARGENBRIGHT, in his official capacity as Commissioner of Political Practices, Defendant,

and

League of Women Voters of Montana, Montana Common Cause, Montpirg 2030 Fund and Citizens for I-125, Defendant-Intervenor-Appellant. Montana Mining Association; Northwest Mining Association; Communities for a Great Northwest; Golden Sunlight Mines, Inc.; Yellow Band Gold, Inc.; Continental Lime, Inc., Plaintiffs-Appellees,

v.

Ed Argenbright; Mike Cooney, Defendants,

and

League of Women Voters of Montana, Montana Common Cause, Montpirg 2030 Fund and Citizens for I-125, Defendant-Intervenor-Appellant. Montana Mining Association; Northwest Mining Association; Communities for a Great Northwest; Golden Sunlight Mines, Inc.; Yellow Band Gold, Inc.; Continental Lime, Inc.,

Plaintiffs-Appellees,

v.

Ed Argenbright, Defendant-Appellant,

and

Mike Cooney, Defendant,

and

League of Women Voters of Montana, Montana Common Cause, Montpirg 2030 Fund and Citizens for I-125,

Defendant-Intervenor.

Montana Chamber of Commerce; Sletten Construction; Lehrkind's Inc.; Kalispell Area Chamber of Commerce; Montana Hospital Association; Montana Farm Bureau; Montana Education Association, Plaintiffs-Appellees,

v.

Ed Argenbright, in his official capacity as Commissioner of Political Practices, Defendant-Appellant,

and

League of Women Voters of Montana, Montana Common Cause, Montpirg 2030 Fund and Citizens For I-125,

Defendant-Intervenor.

Montana Mining Association, Plaintiff,

and

Northwest Mining Association; Communities for A Great Northwest; Continental Lime, Inc., Plaintiffs-Appellants,

v.

Ed Argenbright; Mike Cooney, Defendants-Appellees,

and

League of Women Voters of Montana, Montana Common Cause, Montpirg 2030 Fund and Citizens For I-125,

Intervenor-Appellee.

Montana Mining Association, Plaintiff,

and

Northwest Mining Association; Communities for A Great Northwest; Continental Lime, Inc., Plaintiffs-Appellees,

v.

Ed Argenbright, Defendant,

and

Mike Cooney, Defendant-Appellant.

League of Women Voters of Montana, Montana Common Cause, Montpirg 2030 Fund and Citizens for I-125, Intervenor. Nos. 98-36256, 98-36257, 98-36261, 98-36266, 99-35032 and 99-35033.

Argued and Submitted Nov. 3, 1999
Submission Withdrawn and Deferred Nov. 10, 1999[1]

Resubmitted Sept. 20, 2000
Filed Sept. 26, 2000

William Perry Pendley, Mountain States Legal Foundation, Denver, Colorado, for the plaintiffs-appellants.

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[1] Submission of this case was deferred pending the Supreme Court's decision in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000).

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Appeals from the United States District Court for the District of Montana; Charles C. Lovell, District Judge, Presiding. D.C. Nos. CV-97-00006-CCL, CV-98-00037-CCL.

Before: RYMER, HAWKINS, and McKEOWN, Circuit Judges.

RYMER, Circuit Judge:

These consolidated appeals involve the initiative process in Montana. Montana state officials and the League of Women Voters appeal the district court's decision, following a bench trial, that Initiative 125 (I-125), which prohibits direct corporate expenditures in ballot initiative campaigns, violates the First Amendment.[2] The Montana Mining Association and various organizations subject to I-125 sought to delay, and then to invalidate, the election in which voters approved Initiative 137 (I-137) (restricting certain types of mining) on the ground

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[2] The lead plaintiff in the action seeking to invalidate I-125 was the Montana Chamber of Commerce (Chamber). We shall refer to Ed Argenbright, the Commissioner of Political Practices, and other state officials against whom the action was brought as "Montana"; and to organizations led by the League of Women Voters of Montana, which were intervenors in the district court, as "League." Sometimes we shall refer collectively to all parties who support I-125 and seek to have the district court's decision overturned as "I-125 Proponents." Likewise, we shall sometimes refer to those who argue for affirmance as "I-125 Opponents." The ACLU of Montana filed a brief in support of the judgment of the district court holding I-125 unconstitutional.

that I-125 unconstitutionally constrained their participation in the election process. They appeal the district court's refusal to do either.[3]

We conclude that the constitutionality of I-125 is controlled by *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978), and that the district court did not clearly err in its findings that corporate wealth had not distorted the ballot initiative process in Montana, and that in light of those findings, the First Amendment does not permit restricting corporate speech on public issues. Accordingly, we affirm the declaration that I-125 is unconstitutional.

Whether the court should have considered (and granted) MMA's request to delay the I-137 election is moot, and we cannot say that the court erred by later declining to invalidate it. We therefore affirm the judgment in the I-137 appeal as well.

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Montana voters approved I-125 in November 1996. I-125 amended Montana's elections law by prohibiting

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[3] We shall refer to the parties who sought to enjoin the I-137 election (and who appeal the court's refusal to do so) collectively as "MMA" and to other parties in the same way as in the I-125 appeal. (MMA also sought to have I-125 declared unconstitutional, and its arguments in this connection are treated along with those of the "I-125 Opponents" in the I-125 appeal.) The Montana Environmental Information Center, Montanans for Common Sense Mining Laws-For I-137, and the Montana Council of Trout Unlimited filed an amicus brief in support of affirmance of the district court's refusal to delay or nullify the results of the I-137 election.

direct corporate spending in connection with ballot issues.[4] Specifically, the initiative amended the statutory

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[4] Section 13-35-227 now reads [I-125 additions underlined]:

(1) *(a) Except as provided in subsection (4) a* corporation may not make a contribution or an expenditure in connection with a candidate, *a ballot issue,* or a political committee which supports or opposes a candidate, *a ballot issue,* or a political party.

(b) For purposes of this section, "corporation" refers to for-profit and nonprofit corporations.

(2) A person, candidate, or political committee may not accept or receive a corporate contribution described in subsection (1).

(3) This section does not prohibit the establishment or administration of a separate, segregated fund to be used for making political contributions or expenditures if the fund consists only of voluntary contributions solicited from an individual who is a shareholder, employee, or member of the corporation.

(4) The provisions of subsection (1) prohibiting corporate contributions to or expenditures in connection with a ballot issue do not apply to a nonprofit corporation formed for the purpose, among others, of promoting political ideas and that:

(a) does not engage in business activities;

(b) has no shareholders or other affiliated persons who have a private claim on the corporation's assets or earnings;

(c) does not accept foreign or domestic for-profit corporations as members; and

(d) does not accept in the aggregate more than 5% annually of its total revenue from (foreign or domestic for-profit corporations),

(5) A person who violates this section is subject to the civil penalty provisions of 13-37-128.

provision concerning "[p]rohibited contributions from corporations." Mont.Code Ann. §§ 13-35-227. Under I-125, corporations (other than non-profit corporations formed for solely political purposes) are prohibited from making a contribution or an expenditure in connection with a ballot issue. Corporations may establish and administer a separate, segregated fund that is allowed to solicit contributions from shareholders, employees, or members of the corporation, but not from the company itself.

The Chamber brought an action in federal district court seeking a declaratory judgment that the initiative was unconstitutional and an injunction restraining its enforcement. The court held on summary judgment that I-125 restricted core political speech, but that a trial was necessary to determine whether a compelling state interest justified the restriction.

Meanwhile, in July 1998, I-137 was certified for the November 1998 ballot. MMA, which opposed I-137, brought suit in September 1998 requesting a preliminary injunction that would either waive I-125 as applied to it, or delay the vote on I-137 until after the I-125 case was resolved. The district court consolidated the two actions.

The I-125 trial focused on the health of the Montana initiative process. I-125 Proponents presented evidence on the effect of corporate money in four unsuccessful Montana initiatives. Witnesses testified that corporate opponents substantially outspent initiative proponents in these races. Advocates for the initiatives testified that they believed the defeats resulted from large corporate expenditures in opposition. Political scientists testified

that large scale spending was very effective in initiative campaigns, especially when used in opposition to a ballot issue, and poll results showed that Montanans believe corporations had too much influence in elections. I-125 Opponents, on the other hand, produced evidence that a variety of factors influence election results and that the side spending less money prevailed in 50% of initiative elections. Further, they showed that Montana voter turnout was much higher than the national average, ballot drop-off was low, and the number of ballot issues remained constant over the past 20 years. Finally, I-125 Opponents offered expert testimony that the Montana political system was healthy and free from corruption.

In the I-137 phase, MMA showed that I-125 limited mining companies' ability to oppose I-137 and that I-137 was a significant economic threat to these companies. It also adduced expert testimony that a successful challenge to I-137 was no longer possible, even if the I-125 restriction were lifted, because the I-137 election was only two weeks away. Evidence on the other side showed that the mining companies spent approximately the same amount fighting I-137 as they did in their challenge to the Clean Water Bill, where the I-125 restrictions did not apply.

The district court found the I-125 Opponents' evidence credible and persuasive, accepting their expert's opinion that there is no corruption or appearance of corruption in Montana ballot issue elections. It held that I-125, perhaps facially and certainly as applied, infringes upon the First Amendment rights of speech and association of those subject to its prohibitions; that it was not

narrowly tailored to address only the campaign contributions and expenditures of large corporations; that requiring corporations to fund ballot issue campaign speech through separate, segregated funds (consisting of voluntary contributions from employees, officers, directors, and shareholders) deprives corporations of their ability to communicate political ideas directly to the electorate, which impermissibly chills their speech and association rights and precludes corporations from directly resisting potential laws that could put them out of business; that it prevents the electorate from being exposed to diverse viewpoints on public policy issues; and that the anecdotal evidence presented by I-125 proponents fails to prove that corporations could overwhelm the political speech of individual citizens in Montana to the detriment of the ballot initiative process. Accordingly, the court held, corporations are entitled to defend their economic interests by using the corporate treasury to fund their participation in ballot initiative campaigns. It therefore declared that I-125 is unconstitutional.

In this respect the court ruled in favor of MMA in the I-137 action, but it refused to enjoin the I-137 election on the ground that the relief sought was premature as of the close of evidence, October 22. On November 3, 1998, Montana voters adopted I-137 by a 53% to a 47% margin. MMA then moved to enjoin Montana from validating I-137 by certifying the election results, but the court indicated that it had already ruled and denied the motion.

Both judgments – that I-125 is unconstitutional and that the election in I-137 stands – were appealed.

By the time we heard oral argument in these consolidated appeals, the Supreme Court had granted certiorari in a campaign contribution case, *Shrink Missouri Gov't PAC v. Adams*, 161 F.3d 519 (8th Cir.1998), *cert. granted*, 525 U.S. 1121, 119 S.Ct. 901, 142 L.Ed.2d 901 (1999). We thought it prudent to defer our own decision until the Court had rendered its in *Shrink*. As it turns out, the Court's opinion, *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000), does not affect the disposition in these appeals.

II

We determine the constitutionality of I-125 de novo. *California Democratic Party v. Jones*, 169 F.3d 646, 647 (9th Cir.1999), *rev'd on other grounds*, ___ U.S. ___, 120 S.Ct. 2402, 147 L.Ed.2d 502 (2000). The district court's findings of fact are reviewed for clear error. *Sana v. Hawaiian Cruises, Ltd.*, 181 F.3d 1041, 1044 (9th Cir.1999). While we have not previously addressed the question, we agree with other circuits that have considered similar issues that review of the district court's decision not to delay or void the I-137 election should be for abuse of discretion. *Gjersten v. Board of Election Comm'rs*, 791 F.2d 472, 479 (7th Cir.1986) (decision to invalidate election is reviewed for an abuse of discretion); *Griffin v. Burns*, 570 F.2d 1065, 1079 (1st Cir.1978) (same).

III
I-125

Montana and League argue that corporations possess unique characteristics and legal advantages that permit

them to maximize the accumulation of capital in the economic marketplace. They indicate that I-125 was designed to assure that corporate participation in ballot initiative campaigns reflects actual public support for the corporation's political views, rather than the sheer economic power that a corporation derives from these state-created advantages. To that end, they point out, I-125 prohibits the use of corporate general treasury funds in ballot issue campaigns, while it permits corporations to participate through the use of segregated funds collected from employees, members and shareholders who wish to support the corporation's political activities. Further, they submit, I-125 is carefully tailored to adhere to the Supreme Court's rulings in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990), and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986) (*MCFL*). They fault the district court's decision on a number of fronts: for failing to recognize the compelling state interests supporting I-125 in that the court believed the only type of corruption that would justify I-125's limits was quid pro quo corruption, whereas in *Austin* the Court declined to rely on that limited anti-corruption rationale; for holding that I-125 could be justified only by evidence that money was the most important variable controlling election outcome in Montana, instead of deferring to the legislative judgement that the special benefit conferred by the corporate form presents the *potential* for distorting the political process; and for finding that voter turnout in Montana is higher than the national average, that I-125 improperly "silences" corporations under *Bellotti* because

they retain the right to speak through segregated funds, and that I-125 is unconstitutional even under *Bellotti.*

The Chamber counters that I-125 abridges core First Amendment rights of political speech and association on issues of public policy. This abridgment of political speech in the context of ballot issue campaigns (by contrast with candidate contributions or expenditures) is contrary to *Bellotti* and unjustified by any compelling state interest. Additionally, the Chamber maintains, there is no evidence of corruption or that corporate contributions or expenditures have reduced voter turnout, caused voter fall-off on the ballot, or been the principal determinant of the outcome of a ballot issue campaign; to the contrary, it submits, the evidence shows that the Montana electoral process is healthy and that the most important factor which influences outcome is the development of a credible, concise and understandable campaign message. Finally, it contends, the use of the segregated fund permitted by I-125 is neither a constitutionally permissible alternative to direct corporate speech nor an effective means to communicate core political speech on public policy issues.

We do not wish to appear to give either position short shrift, because all parties have researched, briefed and argued the issues with exceptional ability and professionalism. Yet as we see it, the constitutionality of I-125 comes down to whether restricting corporate expenditures in the ballot issue process is controlled by *Bellotti,* even though I-125 (unlike the Massachusetts statute at issue in *Bellotti*) permits corporations to establish segregated funds through which others may contribute.

Like this case, *Bellotti* involved a limitation on corporate contributions or expenditures in the ballot issue process (there, in connection with a referendum). A Massachusetts statute prohibited such expenditures "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation," and further provided that no issue submitted to the voters which solely concerned individual taxation issues could be deemed to affect a corporation's property, business or assets. When a graduated income tax proposal was put on the ballot, several corporate entities wanted to spend money to publicize their views in opposition. Applying strict scrutiny and requiring the state to show both a compelling interest in prohibiting the "exposition of ideas" and narrowly chosen means to avoid unnecessary abridgment, the Court held that the statute must be invalidated. In doing so, it clearly distinguished elections involving *issues* from elections involving *candidates*. As Montana does here, the state argued in *Bellotti* that preserving the integrity of the electoral process, preventing corruption, and sustaining the active involvement of citizens in good government were important state interests that were threatened by corporate participation in discussion of a referendum issue. The Court noted that if the state's

> arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration. But there has been no showing that the relative voice of corporations

> has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government.

Bellotti, 435 U.S. at 789-90, 98 S.Ct. 1407 (citations omitted). It added:

> Nor are [the state's] arguments inherently persuasive or supported by the precedents of this Court. Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue. To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution "protects expression which is eloquent no less than that which is unconvincing."

Id. at 790, 98 S.Ct. 1407 (citations omitted).[5] Concluding that the statute prohibited protected speech in a manner unjustified by a compelling state interest, the Court invalidated it.

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[5] The Court analogized corporate speech on ballot issues to lobbying by corporations, which the First Amendment protects, *see California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-511, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); *Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-138, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), *id.* at 791 n. 31, 98 S.Ct. 1407, and noted that "the direct participation of the people in a referendum, if anything, increases the need for the widest possible dissemination of information from diverse and antagonistic sources." *Id.* at 790, n. 29, 98 S.Ct. 1407 (citations and internal quotes omitted).

In *Austin*, the Court considered a Michigan statute that prohibited corporations from using corporate treasury funds for independent expenditures in support of, or in opposition to, any candidate in elections for state office, but did not prohibit corporations from making such expenditures from segregated funds used solely for political purposes. The Court acknowledged that requiring corporations to make independent political expenditures only through special segregated funds burdens corporate freedom of expression because "the corporation is *not* free to use its general funds for campaign advocacy purposes," *Austin*, 494 U.S. at 658, 110 S.Ct. 1391 (quoting *MCFL*, 479 U.S. at 252, 107 S.Ct. 616), but held that the state's rationale in supporting a regulation aimed at "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas" was compelling. *Austin*, 494 U.S. at 660, 110 S.Ct. 1391. The Court concluded that "the State's decision to regulate only corporations [was] precisely tailored to serve the compelling state interest of eliminating . . . the corrosive effect of political 'war chests.' " *Id.* at 666, 110 S.Ct. 1391. It therefore upheld Michigan's restriction on independent corporate expenditures in connection with candidate elections for state office.

Justice Brennan, who concurred in the majority's opinion, wrote separately, distinguishing the particular provisions at issue in *Austin* that prohibit corporations from using treasury funds only for independent expenditures in candidate elections, from the restrictions at issue in *Bellotti*, noting that "[a] corporation remains free, for

example, to use general treasury funds to support an initiative proposal in a state referendum." *Id.* at 676, 110 S.Ct. 1391 (Brennan, J. concurring). So did Justice Stevens, who observed that, "as we recognized in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978), there is a vast difference between lobbying and debating public issues on the one hand, and political campaigns for election to public office on the other." *Austin*, 494 U.S. at 678, 110 S.Ct. 1391 (Stevens, J., concurring).

Montana and League are correct that I-125 is similar to the statutory scheme approved in *Austin* to the extent that both statutes allow corporations to set up segregated funds. However, as we read the Court's opinions, *Austin* does not turn on this difference from *Bellotti* so much as it does on the difference between expenditures for candidate elections and ballot issues. As the Court explained, in the context of candidate elections, "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions." *Id.* at 660, 110 S.Ct. 1391. It is also true that the Court indicated in *Bellotti* that through a record or findings, Congress or a state might be able to demonstrate the danger of real or apparent corruption posed by corporate expenditures, 435 U.S. at 787 n. 26 and 789-90, 98 S.Ct. 1407, whereas in *Austin* the Court appears to have accepted the state's articulated interest in avoiding corruption without a record or findings, 494 U.S. at 659-60, 666, 110 S.Ct. 1391. But again, this appears to reflect the difference between restrictions on the corporate voice in public issue elections, and in partisan candidate elections.

Even if *Austin* may plausibly be read as undermining *Bellotti*, this is for the Supreme Court, not us, to say. As the Court has instructed, " '[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.' " *Agostini v. Felton*, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989)). *Austin* cited *Bellotti* and did not overrule it. Therefore, we believe that *Bellotti* is still good law, and controls.

There is no question that a law requiring corporations to make independent expenditures (even for candidates) through a segregated fund burdens corporate expression. *Austin* and *MCFL* so recognize. The burden is even greater when the limitation has to do with independent expenditures in the ballot issue process, as speech on such issues is "at the heart of the First Amendment's protection." *Bellotti*, 435 U.S. at 776, 98 S.Ct. 1407.

Because the state's interest in preventing corporate wealth from distorting the political process is not obvious or compelling in connection with ballot issue elections, *Bellotti*, 435 U.S. at 789-92, 98 S.Ct. 1407, the district court in this case heard considerable evidence, both empirical and expert. It found that "the state has failed to produce evidence that would support a judicial finding that corporate wealth has dominated citizen voices to the detriment of the ballot initiative process." As there was evidence pointing in each direction, we cannot say the

court clearly erred in finding that there was no imminent threat to the democratic process.

It follows that I-125 unconstitutionally restricts public discussion in the ballot issue (initiative) process. As the Court concluded in *Bellotti* with respect to the Massachusetts statute, we conclude here that, " '[a] restriction so destructive of the right of public discussion [as I-125], without greater or more imminent danger to the public interest than existed in this case, is incompatible with the freedoms secured by the First Amendment.' " *Id.* at 792, 98 S.Ct. 1407 (quoting *Thomas v. Collins*, 323 U.S. 516, 537, 65 S.Ct. 315, 89 L.Ed. 430 (1945)).[6] Its enforcement was, therefore, properly enjoined.

IV

I-137

Having determined that I-125 is unconstitutional, we must decide whether the district court should have delayed or invalidated the I-137 election. Although we have previously held that challenges to election procedures should be made before the election occurs, *see Soules v. Kauaians for Nukolii Campaign Committee*, 849 F.2d 1176, 1180-81 (9th Cir.1988) (post-election challenge came too late); *Chinese for Affirmative Action v. Leguennec*, 580 F.2d 1006, 1008 (9th Cir.1978) (parties must bring complaints forward for preelection adjudication), we have not expressly considered whether it is error for a court to

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[6] Given this conclusion, we need not reach the question of whether I-125 is "sufficiently tailored" to meet compelling state interests.

refuse to resolve such challenges on the footing that a pre-election challenge is premature. Nor do we need to do so now, for this issue, together with the question whether MMA's pre-election request for injunctive relief should have been granted, are moot.

This leaves only the question whether the district court erred in refusing to invalidate the election. A state election violates due process "if it is conducted in a manner that is fundamentally unfair." *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir.1998). Of course, "the voiding of a state election is a 'drastic if not staggering' remedy." *Soules*, 849 F.2d at 1180 (quoting *Bell v. Southwell*, 376 F.2d 659, 662 (5th Cir.1967)). In determining whether to void an election, we balance the constitutional violation against the "countervailing equitable factors" such as "the extremely disruptive effect of election invalidation and the havoc it wreaks upon local political continuity." *Soules*, 849 F.2d at 1180.

Here, even though there was evidence that I-125 had affected MMA's ability to campaign, there was also evidence that it had no substantial impact. Eleven days remained before the election after the district court lifted the I-125 restrictions. And the state has a significant interest in avoiding the costs of a special election. In these circumstances, we cannot say that the district court abused its discretion in failing to void the results of the election.

AFFIRMED.

McKEOWN, Circuit Judge, concurring:

I join in the opinion but write separately to underscore that First Amendment protection of political contributions is not absolute. Here, in light of the specific evidence presented and in light of the requirements of *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978), the state failed to sustain its burden of articulating a compelling interest for the restrictions. This is not to say, however, that such compelling interests do not exist, even in the context of initiative elections. The Supreme Court's recent treatment of the evidentiary burden is instructive:

> The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised. *Buckley* demonstrates that the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible.

Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 120 S.Ct. 897, 907, 145 L.Ed.2d 886 (2000). Although *Shrink* concerned candidate elections, its reasoning on judicial scrutiny of state-asserted compelling interests applies with similar force to campaigns for ballot measures.

Legitimate policy concerns have prompted legislators to address the power of the corporate contributor. I believe that a statute may be carefully crafted and tailored to meet a compelling interest in preserving the integrity of the electoral process, such as where contributions so distort the political process that they undermine our democratic system. But that is a case for another day.

HAWKINS, Circuit Judge, dissenting:

We occasionally hear a case falling so squarely between two conflicting Supreme Court opinions that no matter which way we veer, we are likely to run aground. This is one of those cases. With *Bellotti* and *Austin*, the Supreme Court has laid out a difficult course for us to navigate in determining whether restrictions on corporate campaign spending are constitutional. Judge Rymer works her way admirably through this challenge, but in the end I am not convinced. At the risk of running off course myself, I choose a different line because I think it is more consistent with the development of Supreme Court precedent in this area and reflects a more sensitive understanding of the ways in which corporate spending can distort the electoral process. Although certainly not dispositive, this approach has the added benefit of upholding the expressed discernment of the people of Montana about these matters.

In *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), the Court's first major campaign spending case, the plaintiffs challenged the Federal Election Campaign Act, which placed dollar limits on political contributions to candidates and on individual expenditures "relative to a clearly identified candidate."[1] The

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[1] The Act also limited campaign spending by candidates for various federal offices and spending for national conventions by political parties. It required that contributions and expenditures over a certain amount be reported and publicly disclosed, established a system for funding Presidential elections, and created the Federal Election Commission to monitor and enforce these regulations. *See Buckley*, 424 U.S. at 7, 96 S.Ct. 612.

Court held that the contribution limits were constitutional because the government has a compelling interest in eliminating corruption (or its appearance) in the electoral process, and the restrictions did not completely preclude individuals or groups from expressing their support of a particular candidate. *See id.* at 26-29, 96 S.Ct. 612. But the limits on individual expenditures were struck down. These restrictions, the Court held, could not be justified by the government's interest in battling corruption because independent spending in candidate elections presents little risk of quid pro quo bargaining. *See id.* at 45-47, 96 S.Ct. 612.

Shortly afterward, the Court decided *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978), which involved a complete ban on corporate spending in referenda campaigns. Here, as in *Buckley*, the government argued that the restriction was justified by its interest in battling corruption and in preserving the integrity of the electoral process. *See id.* at 788-89, 98 S.Ct. 1407. The Court disagreed. "Referenda are held on issues, not candidates for public office," the Court stated. *See id.* at 790, 96 S.Ct. 612. And while a candidate may offer political favors in return for campaign contributions, a referendum cannot. As a result, "[t]he risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue." *Id.*

Buckley and *Bellotti* focused much attention on the government's asserted interest in preventing quid pro quo corruption. Indeed, in a subsequent case, the Court stated that "preventing corruption or the appearance of

corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-97, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985).

But twelve years after *Bellotti*, the Court was presented with a new asserted interest. In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990), a state statute prohibited corporations from using general treasury funds to make independent expenditures in candidate elections, but allowed them to set up segregated campaign funds to which employees, shareholders, and members could contribute. *See id.* at 655-56, 110 S.Ct. 1391. Because the statute targeted campaign expenditures, not contributions, the state could not justify it as a measure to fight quid pro quo corruption. *See Buckley*, 424 U.S. at 45-47, 96 S.Ct. 612. So instead, the state argued that "the unique legal and economic characteristics of corporations" created the risk of a different kind of corruption not based on political deal-making.

Four years earlier, the Court had itself identified this "new" form of corruption. In *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986) ("*MCFL*"), the Court explained that state laws grant corporations special advantages that not only allow them to play a dominant role in the economy, but permit them to use "resources amassed in the economic marketplace" to obtain "an unfair advantage in the political marketplace." The Court elaborated:

> The resources in the treasury of a business corporation, however, are not an indication of popular support for the corporation's political

> ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.

Id. at 258, 107 S.Ct. 616.

The Court nonetheless struck down the corporate spending limits in *MCFL* as applied because the plaintiff was an ideological organization "formed to disseminate political ideas, not to amass capital." *Id.* at 259, 107 S.Ct. 616. But the plaintiff in *Austin*, the Michigan Chamber of Commerce, possessed several characteristics that made it more like a corporation and less like a nonprofit ideological group. *See Austin*, 494 U.S. at 662-665, 110 S.Ct. 1391. So the Court applied the analysis it had articulated in *MCFL* to uphold the statute.

Michigan's statute, the Court made clear, did not aim at traditional quid pro quo corruption. *See id.* at 659, 110 S.Ct. 1391. It targeted "a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.* at 660, 110 S.Ct. 1391. "The unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures," the Court stated. *Id.* "Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions. We therefore hold that the state has articulated a

sufficiently compelling rationale to support its restriction on independent expenditures by corporations." *Id.*

Austin did not expressly overrule *Bellotti;* in fact, Justice Marshall's opinion remained conspicuously silent about the relevance of its holding for state referenda.[2] But most observers have concluded that the Court's analysis undermines the distinction between candidate elections and referenda, which was the key to *Bellotti.* Although the traditional quid pro quo corruption may not be a problem in referenda, it is difficult to see why the distorting effects of corporate wealth – the "new corruption," as it has been called – would not be equally problematic in both contexts. Once *Austin* was decided, therefore, the natural conclusion was that a similar restriction on corporate spending in state referenda would be upheld in spite of *Bellotti. See* Thomas C. Goldstein, *Corporate Influence in Referenda: A Comment About the Prescription,* 1996 Ann. Surv. Am. L. 469, 473 (1996) (stating that "the Court in *Austin* substantially reversed course from *Bellotti*" and that "the expenditures in *Austin,* which were not coordinated with the candidate, were the rough equivalent of spending in referenda."); James B. Raskin, *Direct Democracy, Corporate Power and Judicial Review of Popularly-Enacted Campaign Finance Reform,* 1996 Ann. Surv. Am. L.Rev. 393, 408 (stating that a ban on corporate spending in ballot initiatives is "perfectly congruent with the Court's new and far more nuanced conception of 'corruption' "); Gerald G. Ashdown, *Controlling Campaign Spending and the New Corruption: Waiting for the Court,* 44

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[2] The opinion cited *Bellotti* only four times and exclusively on mundane issues.

Vanderbilt Law Review 767, 779 (1991) ("The conclusion is inescapable that legislatures are now free to restrict corporations to spend only from separate political funds *in ballot measures as well as candidate elections.*") (emphasis added); David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance,* 9 Yale L. & Pol'y Rev. 236, 252 (1991) ("[I]f corruption includes the distorting effects of large amounts of wealth on the political debate, corruption is no less troubling in referenda than in candidate elections. Thus, this distinction also seems destined to fall in light of the *Austin* Court's redefinition of corruption.").

Judge Rymer resists this conclusion. Although the Montana initiative is identical to the *Austin* statute in that it permits corporations to spend from a segregated fund – something the *Bellotti* statute did not allow – she asserts that the relevant distinction is between laws that regulate spending in candidate elections and laws that target spending in ballot initiatives or referenda. (Majority Op. at 1057). She does not explain how this traditional distinction survives *Austin*'s identification of a new form of corruption unrelated to quid pro quo bargaining. She only quotes *Austin*'s statement that "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions." (Majority Op. at 1057). This statement, however, does not suggest that corporate wealth plays a greater role in candidate elections than in referenda. It merely describes the effect of corporate wealth in elections generally.

Judge Rymer appears to recognize this difficulty. As a result, she attempts to find support for her position in the

concurring opinions of Justices Brennan and Stevens in *Austin*. She suggests that Justice Brennan relied on the same distinction between candidate elections and referenda campaigns that she relies on here. Justice Brennan, she points out, noted that under the *Austin* statute, "a corporation remains free, for example to use general treasury funds to support an initiative proposal in a state referendum." (Majority Op. at 1056-57). The implication is that Justice Brennan's vote turned on the limited scope of the *Austin* statute.

A closer reading of Justice Brennan's statement undermines this implication. When Justice Brennan made this statement, he was responding to the dissent's claim that the statute was under-inclusive. He first acknowledged that the statute "is concededly under-inclusive insofar as it does not ban other types of political expenditures to which a dissenting . . . corporate shareholder might object." *Austin*, 494 U.S. at 675-76, 110 S.Ct. 1391. He then explained: "The particular provision at issue prohibits corporations from using treasury funds only for making independent expenditures in support of, or in opposition to, any candidate in state elections. A corporation remains free, for example, to use general treasury funds to support an initiative proposal in a state referendum." *Id.* at 676, 110 S.Ct. 1391.

The context of Justice Brennan's statement makes clear that he did not think the limited scope of the statute (i.e. that it did not restrict corporate spending in state referenda) was what saved it. In fact, he recognized that the statute's under-inclusiveness was problematic. He then argued that this under-inclusiveness was not fatal because candidate elections are at the heart of political

debate and the state can choose to single out corporate spending in that context. *See id.* at 676-77, 110 S.Ct. 1391. He never suggested, however, that the state could not go further and limit corporate spending in referenda or ballot initiatives. Nor did he suggest that what distinguished *Austin* from *Bellotti* was that the latter involved referenda. To the contrary, he explained that *Bellotti* was different because it involved a complete ban on corporate spending, while *Austin* allowed for a segregated fund. *See id.* at 670 n. 1, 110 S.Ct. 1391 ("In [*MCFL*], we observed that the requirement that expenditures be made through PACs 'is of course distinguishable from the complete foreclosure of any opportunity for political speech that we invalidated in' *First National Bank of Boston v. Bellotti.*").

Justice Stevens did distinguish *Bellotti* from *Austin* on the ground that one involved referenda and the other involved candidate elections. *See id.* at 678, 110 S.Ct. 1391. But that is because he rejected *Buckley*'s conclusion that restrictions on campaign expenditures were not justified by the government's interest in preventing quid pro quo corruption. *See id.* Therefore, he did not need to rely on the government's new asserted interest – that corporate wealth distorts the electoral process. And because he relied on the traditional corruption rationale, he could make the same distinction the Court made in *Bellotti.* Justice Stevens' views are interesting, but because he was the sixth vote to uphold the statute, they shed little light on the majority's holding.

Finally, Judge Rymer argues that when a Supreme Court opinion directly applies to a case we must follow it even if the opinion's reasoning was undermined by a later Court decision. (Majority Op. at 1057). This is a

serious argument no doubt. *Bellotti* has not been overruled, and the facts of this case are similar to *Bellotti:* both involve restrictions on corporate spending in state referenda. The problem is that while the facts of the two cases are similar, there is also a significant difference. The Montana initiative – like the statute in *Austin* – allows for corporate spending through a segregated fund, while the *Bellotti* statute banned corporate spending entirely. Thus, to say we must follow the case that directly applies begs the question: which case applies when both share a common and important feature with the case before us? In such a situation, we should not simply assert that one case directly applies and then ignore the other. We must do our best to reconcile the two. And in my opinion, the best way to reconcile these cases is to acknowledge that *Austin* identified a new rationale for limiting corporate campaign spending that does not turn on whether candidate elections or ballot initiatives are at issue. In addition, the statute in *Austin* was less objectionable than the statute in *Bellotti* because it allowed for corporate spending through a segregated fund. Because the initiative also allows for a segregated fund, I think it is justified by Montana's asserted interest in eliminating what its people have determined to be distorting effects of corporate wealth on the electoral process.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

* * *

MONTANA MINING ASSOCIATION, ET AL.,
Plaintiffs,

-vs-

ED ARGENBRIGHT, ET AL.,
Defendants.

CV 98-37-H-CCL

ORDER

FILED SEP 18 1998

* * *

All plaintiffs through counsel seek hearing on their pending motions for preliminary injunction and also move the court for its order consolidating this case with *Montana Chamber of Commerce, et al v. Ed Argenbright* (CV 97-6-H-CCL) and alternatively request combining trial on the merits with hearing on the motions.

All counsel involved with *Montana Chambers* reportedly have been contacted. Mr. Motl and Mr. Scheier object, and Mr. Kaleczyc hasn't decided. Mr. Whyte, appearing here on behalf of defendant Cooney, has no objection.

Even before receiving this latest request, the court had prepared, in draft form, an order setting down the motions for preliminary injunction as the number two matter on October 13, 1998, behind case number one, *Montana Chamber,* suggesting to these parties plaintiff that they stipulate to combine trial on the merits with hearing on the motions for preliminary injunction (not an

uncommon procedure here), permitting the motions and hopefully the trial on merits to come on immediately for hearing upon conclusion of the first trial, with the court to decide neither matter until both had been fully heard, thus consolidating the cases to this limited extent. These cases cry out for some form of consolidation. The court's plan has the benefit of allowing all parties to be fully heard without causing interference in the presentation of either case by the other. It also benefits the court since it provides the court with all evidence in both cases before deciding either, and it provides some measures of judicial economy in the handling of the two cases. The drawback to this procedure is that it requires Mr. Motl and Mr. Scheier to prepare the discovery and prepare for a second trial on relatively short notice.

The court has been withholding this order waiting to hear from Colorado counsel in response to Mr. Motl's motion to intervene in this case which motion, of course, must be granted if any of these alternatives is to go forward.

Because plaintiffs are willing to combine their trial on the merits with hearing on the motions, the court is inclined to combine the same and to proceed with the limited consolidation described above, setting down the trial and hearing as the number two case on October 13, 1998.

As to the objection of Mr. Scheier and Mr. Motl, both should recognize that the court has jurisdiction and discretion to make this order *sua sponte*, and that some type of consolidation is the only reasonable way to proceed herein. It may be that they each will have to secure more

help to meet the increased workload that this will require over the next several weeks. This should be no problem for Mr. Scheier since the sovereign has abundant and talented resources who can or should be readily available. It may be burdensome for Mr. Motl but the court is confident that he will be able to rise to the occasion. I would also remind Messrs. Kaleczyc, Motl, and Scheier that I had their case set for trial in May and it would have been tried and decided then but for their requests for extension of time. They have had more than adequate time to prepare for the October 13, 1998, trial.

Accordingly,

IT IS ORDERED:

1. Plaintiffs' pending motions for preliminary injunction and trial on the merits are consolidated and the same is set down for hearing and trail as the number two case on October 13, 1998, before the undersigned sitting without a jury in the main courtroom U.S. courthouse, Helena, Montana. These matters will be heard immediately following *Montana Chamber of Commerce, et al. v. Ed Argenbright*, and the court will decide both cases after hearing all the evidence and argument in each.

2. The motion of Jonathan Motl to intervene herein on behalf of his client I-125 Proponents' Committee is hereby granted.

3. The parties shall forthwith meet, confer and submit a proposed discovery schedule to the court.

4. On or before September 30, 1998, the parties shall each provide to the undersigned written proposed findings of fact, conclusions of law and judgment, as

well as a trial brief outlining all issues, whether factual, legal, procedural or evidentiary, that are anticipated to arise at trial. The trial brief shall also include an exhibit list, witness list, and detailed objections, if any, to the exhibits proposed by opposing parties. The parties need not serve a copy of their trial briefs or proposed findings, conclusions, and judgment on opposing counsel, except that the parties shall serve a copy of their exhibit and witness lists and objections to exhibits on all other parties.

The clerk is directed forthwith to notify all parties herein and in CV 97-6-H-CCL of entry of this order and to file a machine copy hereof in CV 97-6-H-CCL.

Done and dated this 17 day of September, 1998.

/s/ Charles C. Lovell
CHARLES C. LOVELL
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MONTANA MINING ASSOCIATION, NORTHWEST MINING ASSOCIATION, COMMUNITIES FOR A GREAT NORTHWEST, YELLOW BAND GOLD, INC., CONTINENTAL LIME, INC., GOLDEN SUNLIGHT MINES, INC.,

Plaintiffs,

-vs-

ED ARGENBRIGHT, in his official capacity as Montana Commissioner of Political Practices, MIKE COONEY, in his official capacity as Montana Secretary of State,

Defendants,

and LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND, AND CITIZENS FOR I-125,

Defendant-Intervenors.

Civil Docket
No. 98-37-H-CCL

TRANSCRIPT OF BENCH TRIAL PROCEEDINGS

Heard in Courtroom No. 551
United States Courthouse
301 South Park
Helena, Montana
October 21 and 22, 1998

BEFORE THE HONORABLE CHARLES C. LOVELL

UNITED STATES DISTRICT JUDGE

* * *

COLLOQUY

[241] this compelling interest to demonstrate that there has been corruption.

In fact, Ms. Wright even said what did the voters say? They didn't want another layer of bureaucracy. They didn't want more taxes. I think that's a justified conclusion. I think the voters of Montana are perfectly capable of coming to such a conclusion, and apparently they did. Without filling in the gap, without saying what that corruption is, without some evidence of it, they have not demonstrated – not carried their burden, demonstrated compelling governmental interest.

Your Honor, defendants' case is long on emotion, long on feelings; totally devoid of evidence.

Thank you, Your Honor.

THE COURT: Thank you.

The matter then is deemed submitted to the court for decision.

Obviously, I can't list for you today all of the court's findings of fact and conclusions of law. I do intend,

however, to rule from the bench on the issues before the court and to enter written findings, conclusions, and judgment later explaining the reasons for the ruling.

Now, the two cases before the court for decision are Montana Chamber of Commerce against Argenbright, No. 97-6, and Montana Mining Association and others against [242] Argenbright, which is 98-37.

As to both cases, the court finds first that the court does have jurisdiction. Clearly, there is federal question jurisdiction here under Section 1331 of title 28 of the United States Code.

Secondly, the parties have standing.

Next, on the merits, the court finds that Initiative 125 is clearly a restriction on corporate speech and First Amendment rights.

Now, the question then is whether this is justified by any compelling interest of the State of Montana. The evidence does not show any actual corruption in the ballot issue election arena. There's evidence both ways as to the impact of corporate contributions. There was substantial evidence, and the court so finds, that the Montana system of issue balloting is healthy. There have been remarkable voter turnouts on issues in Montana elections which have been among the highest in the nation.

Court finds that there are many factors involved other than money alone, and the court is unwilling to draw the conclusion that defendants have asked the court to draw based on the evidence before it.

So there is a failure of proof of any justified compelling interest for the restrictions that are interposed under Initiative I-125.

[243] The impact, therefore, of I-125 is that the corporate voice is silenced and there's a chilling effect on corporate officers and directors.

Now, the United States Supreme Court has held that corporations do have First Amendment rights of speech, just as do natural persons. There may be many people who disagree with this proposition, but this is the law and it is the fundamental and basic rule to be applied in these cases. It's true that an initiative of the people of the State of Montana – this process is really a cherished process, but it has to yield to the requisites of the United States Constitution.

Court concludes that I-125 is an unjustified and unconstitutional infringement on corporate First Amendment rights, and accordingly, it is ordered, adjudged, and decreed that I-125 is unconstitutional and void, and the defendants are permanently enjoined from enforcing it.

Now, as to case No. 2, what does that do to I-137? The plaintiffs have asked the court to stop the election as to 137 and/or to stop the Secretary of State from counting the ballots. There hasn't been really any argument by either the plaintiffs or the defendants on this point. There really isn't any authority that's been submitted that would, in my view, warrant this action by the court.

It seems to me that if I-137 is as bad as the [244] plaintiffs claim it is and if their plight is as bad as they say it is, then they ought to have a remedy later. They're

not injured at this point, and who knows, they may be able to persuade the people that I-137 ought not be adopted.

If that's the case, then there is nothing for the courts to rule on. But it seems to me this issue is premature at this point, and the court therefore denies that request.

I want to thank the lawyers in both cases. I didn't dream that you could present the volume and the quality of evidence that's been brought forth here. It is surprising to me.

I also appreciate the way that you've cooperated with each other to get these cases before the court and get them decided. It is unusual that a case such as the mining case here can be filed one month, tried the next month, and decided that same month.

Court's adjourned.

(The proceedings in this matter were adjourned at 2:10 p.m.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MONTANA MINING ASSOCIATION, NORTHWEST MINING ASSOCIATION, COMMUNITIES FOR A GREAT NORTHWEST, GOLDEN SUNLIGHT MINES, INC., YELLOW BAND GOLD, INC. and CONTINENTAL LIME, INC.,

Plaintiffs,

-v-

ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices, and MIKE COONEY, in his official capacity as Montana Secretary of State,

Defendants,

and

I-125 PROPONENTS' COMMITTEE,

Defendant-Intervenor.

CV 98-37-H-CCL

ORDER

(Filed Nov. 13, 1998)

Upon the close of evidence on October 22, 1998, the court fully decided this case, ruling that I-125 was unconstitutional but denying Plaintiffs' all injunctive relief as to I-137. The court noted that a later opinion and order would fully set forth its findings of fact and explain its ruling.

Now, before entry of this opinion and order, Plaintiffs move herein to enjoin Montana from validating I-137 by

certifying the election results. The court has ruled; the motion is denied.

The Clerk is directed to notify forthwith the parties of entry of this order.

Done and dated this 13th day of November, 1998.

/s/ Charles C. Lovell
CHARLES C. LOVELL
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MONTANA CHAMBER OF COMMERCE, SLETTEN CONSTRUCTION COMPANY, LEHRKIND'S, INC., KALISPELL AREA CHAMBER OF COMMERCE, MONTANA HOSPITAL ASSOCIATION, MONTANA FARM BUREAU FEDERATION, MONTANA EDUCATION ASSOCIATION,

Plaintiffs,

-v-

ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices,

Defendant,

and

I-125 PROPONENTS' COMMITTEE,

Defendant-Intervenor.

CV 97-6-H-CCL

MONTANA MINING ASSOCIATION, NORTHWEST MINING ASSOCIATION, COMMUNITIES FOR A GREAT NORTHWEST, GOLDEN SUNLIGHT MINES, INC.,

CV 98-37-H-CCL

YELLOW BAND GOLD, INC. and
CONTINENTAL LIME, INC.,

Plaintiffs,

-v-

ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices, and MIKE COONEY, in his official capacity as Montana Secretary of State,

Defendants,

and

I-125 PROPONENTS' COMMITTEE,

Defendant-Intervenor.

OPINION and ORDER

[Filed Nov. 20, 1998]

These two cases (hereinafter *Montana Chamber* and *Montana Mining Ass'n*, respectively) seek declaratory judgments and injunctive relief invalidating Initiative 125, and the *Montana Mining Ass'n* suit seeks similar relief as to Initiative 137. The court granted limited consolidation of the two cases by setting down serial trials with both cases to be tried before the court decided either, and with all agreeing that all evidence in the *Montana Chamber* case was also before the court in the *Montana Mining Ass'n* case. The cases came on regularly for trial on the merits on October 13 and October 21, 1998, respectively. In the case of *Montana Mining Ass'n*, a hearing on Plaintiffs' motions for preliminary injunction was merged with the trial.

The court has jurisdiction over both cases pursuant to 28 U.S.C. § 1331 (federal question). Having shown an invasion of a legally protected interest, a causal connection between the injury and the matter complained of, and a likelihood that the injury can be redressed by a favorable decision, *see Lee v. State of Oregon*, 107 F.3d 1382, 1387 (9th Cir. 1997), the Plaintiffs in both cases (with one exception) have standing to litigate their complaints. All parties in the *Montana Chamber* case agree that Plaintiff Montana Education Association ("MEA") no longer has standing and ought to be dismissed from the case because the MEA has disincorporated to avoid the restrictions imposed by Initiative 125.

After receiving the evidence in both trials and after considering the arguments of all the parties, the court ruled from the bench on October 22, 1998, finding in favor of the Plaintiffs in both cases as to the unconstitutionality of I-125 but denying the injunction against I-137 sought by the Plaintiffs in the *Montana Mining Ass'n* case. The following opinion explains the court's reasoning and also shall stand for the court's findings of fact and conclusions of law. Fed. R. Civ. P. 52(a).

Background

Since 1975, a total prohibition against all corporate contributions or payments to Montana ballot elections has been considered to be an overbroad, blanket infringement of corporations' First Amendment rights. *C & C Plywood Corp. v. Hanson*, 420 F. Supp. 1254 (D. Mont. 1976), *aff'd* 583 F.2d 421 (9th Cir. 1978). In *C & C Plywood*, the circuit panel began its review with the fundamental

proposition that political speech is "at the heart of the First Amendment's protection." *Id.* at 423 (*quoting First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)). In affirming the district court's decision, the circuit panel also relied upon *Bellotti* for the rule that corporate speech is protected by the First Amendment unless a compelling state interest can be shown that justifies the abridgment. *Id.* at 423-25. The panel noted that corruption is not an issue in nonpartisan ballot issue elections (at least in the sense of *quid pro quo* corruption, which is generally defined as an attempt to buy political favors from candidates by individuals or corporations). *Id.* at 425. Thus, from 1975 until 1996 Montana corporations have been permitted to make contributions and expenditures to support or oppose ballot issues in Montana.

In 1996, however, Montana voters approved Initiative 125 ("I-125"), which amends Mont. Code Ann. § 13-35-227 and provides as follows:

> (1) (a) Except as provided in subsection (4), a corporation may not make a contribution or an expenditure in connection with a . . . ballot issue, or a political committee which supports or opposes a . . . ballot issue.
>
> (b) For purposes of this section, "corporation" refers to for-profit and nonprofit corporations.
>
> . . .
>
> (4) The provisions of subsection (1) prohibiting corporate contributions to or expenditures in connection with a ballot issue do not apply to a nonprofit corporation formed for the purpose, among others, of promoting political ideas, and that:
>
> (a) does not engage in business activities;

> (b) has no shareholders or other affiliated persons who have a private claim on the corporation's assets or earnings;
>
> (c) does not accept foreign or domestic for-profit corporations as members; and
>
> (d) does not accept in the aggregate more than 5% annually of its total revenue from foreign or domestic for-profit corporations.

The codification of I-125 was itself amended by the 55th Legislature by means of House Bill 575, effective April 17, 1997, which amendment deleted the exception regarding nonprofits (§13-35-227(4)) and expanded the class of entities affected by I-125 from corporations to include partnerships, associations, cooperatives, and other organizations. *See* Mont. Code Ann. § 13-35-236 (1997). On February 18, 1998, this court granted the *Montana Chamber* Plaintiff's summary judgment motion as to Count VI of their Amended Complaint, and in so doing declared that H.B. 575 was an unconstitutional and unenforceable abridgement of Plaintiffs' First Amendment freedoms of speech and association. This partial summary judgment decision left open the question whether I-125 itself violates the First Amendment and is therefore unconstitutional and unenforceable. This issue was set for trial to allow Plaintiffs to present their case and particularly to permit Defendants to present evidence to support their contentions that a compelling state interest justifies the speech restrictions imposed by I-125.

Evidence at Trial

Plaintiffs presented documentary evidence and witnesses, including Robert Brown, Robert Gannon, David Owen, Eric Feaver, Jerome Anderson, James Lopach, Herbert Alexander, Ed Argenbright, and Robert Moore.

Sen. Bob Brown, director of the campaign committee supporting Referendum 113, the Six Mills Levy University Funding Initiative, testified extensively regarding the manner in which I-125 hampered his ability to raise funds for R-113. Sen. Brown testified that many corporations, both for-profits and non-profits, were not contributing to this initiative campaign as they had in the past because of fear of running afoul of I-125, and that as a result the campaign committee lacked funds with which to educate Montanans about R-113.

Robert Gannon, Chairman of the Board, CEO, and President of Montana Power Company ("MPC"), testified persuasively regarding the inability of MPC to utilize its employee political action committee (the "MPC PAC") to respond to ballot initiatives that might threaten MPC's economic interests. Although no such ballot initiatives were qualified for the 1998 election cycle, three petitions were circulated that would have had major effects upon MPC's electric restructuring process. Mr. Gannon explained that little time is available to respond to a ballot initiative question, that he is the ultimate decision-maker regarding MPC's ballot initiative strategy, and that large amounts of money could be required to mount effective campaigns against ballot initiatives threatening MPC's interests. The MPC PAC is not an effective vehicle for this purpose, for the MPC PAC collects only about

$15,000 in funds each year (which funds are distributed to legislative candidates). The MPC PAC is controlled by a diverse committee of employees, and it therefore cannot make campaign strategy decisions as quickly as can a single individual such as the CEO of MPC. The MPC PAC therefore expresses the political positions of the employees who contribute to it; the MPC PAC does not, is not designed to, and really cannot express the political positions of MPC itself. (About half of MPC's shareholders are corporations who likewise are prohibited under I-125 according to Mr. Gannon.)

Mr. Gannon also testified that because of I-125 he was uncomfortable expressing his personal opinions in any public forum regarding a ballot issue such as R-113. Such public expressions of private sentiments might be misconstrued as a forbidden corporate in-kind contribution to the R-113 ballot issue campaign because, as President of MPC, Mr. Gannon is widely viewed as MPC's spokesperson, and he is compensated by MPC to express its views. Thus, Mr. Gannon's personal speech has been chilled in the context of ballot issue debates due to I-125.

David Owen, President of the Montana Chamber of Commerce, testified that his ability to perform his political duties as Chamber president has been all but extinguished. Most of the Montana Chamber of Commerce members are corporations; therefore a Chamber PAC would not be an effective vehicle to raise and manage ballot issue contributions and expenditures because the corporate Chamber members would be prevented from contributing to the PAC by I-125. Mr. Owen testified that he cannot travel around the state and speak to the membership of service clubs regarding ballot issues because

these audiences contain non-Chamber of Commerce members, making such travel and speaking arrangements a prohibited in-kind contribution to a ballot issue campaign. Neither can Mr. Owen be interviewed or participate in radio or television debates on ballot issues. Neither can Mr. Owen write editorials to express the political views of the Montana Chamber of Commerce regarding ballot issues, much less organize campaigns and coalitions to promote or fight ballot issues. The Montana Chamber is even reluctant to take official positions in its own newsletter for fear of communicating with non-members in violation of I-125. Like Mr. Gannon, Mr. Owen testified that his personal political speech about ballot issues has been chilled due to his concern that his speech might be attributed to the Chamber of Commerce, for which he is obviously a spokesperson.

Eric Feaver, the President of the Montana Education Association ("MEA") testified that the MBA relinquished its incorporated status in order to fight Constitutional Initiative 75 ("CI-75"), a ballot issue calling for a requirement that all taxes be put to a popular vote. Although the primary function of the MEA is to organize collective bargaining for its 10,000 members, the MEA also markets insurance and health care to its members, as well as conducting other miscellaneous business enterprises. In addition to its primary advocacy, the MEA engages in legislative lobbying and ballot issues campaigning. Although the MEA has created a PAC fund for ballot issues, and through that fund the MEA has raised over $30,000 for ballot issue campaigns, Mr. Feaver testified that the MEA was unable to raise through its PAC the amount of money it requires to fight CI-75. Because I-125

would have stifled MEA's right to political speech its corporate entity was dissolved to escape the prohibition.

Jerome Anderson, opposition campaign director for I-115 in 1990 and I-122 in 1996, testified that he does not believe that sheer dollars are the ultimate factor in an opposition campaign. Instead, Mr. Anderson believes that the defeat of other initiatives (I-115 and I-122) depended upon the development of credible, persuasive messages which were consistent with the values of a majority of voters. Mr. Anderson testified that I-125 has curtailed the free flow of information in ballot issue campaigns. As an example, he asserted that technical reports obtained from corporations for use as campaign literature in the I-122 opposition campaign could not be used after the passage of I-125 because they would be prohibited in-kind contributions to a ballot issue campaign. Mr. Anderson also noted that this was the quietest general election campaign season he can recall observing.

The testimony of Dr. James Lopach, professor of political science at the University of Montana, was particularly enlightening. Dr. Lopach has extensively studied Montana politics, electoral politics, voting behavior, and ballot elections. Dr. Lopach's expert opinion is that there is no corruption in the Montana political system. Not only is Dr. Lopach unaware of any actual corruption in Montana politics, but also he is unaware of any issue giving rise to the appearance of corruption in the eyes of the voters.

Dr. Lopach testified that Montana's political process is very healthy in that there is a proper degree of party competition, high voter turnouts, and low voter fall-off

on the ballot. Montana's voter turnout is approximately 15% higher than the national average. Voter falloff, which is defined as the failure of voters to vote from the top to the bottom of the ballot, is quite low, and in some instances voters have had a higher participation in ballot issues (at the bottom of the ballot) than in major candidate races, as in 1996 when 97.3% of the voters participated in the I-122 ballot but 97.1% of the voters participated in the governor's race.

Dr. Lopach testified that money is not the principal determinant of ballot issue campaigns. Dr. Lopach's opinion is that I-125 has had the negative effect of cutting off meaningful political speech. Although money is one factor influencing ballot issue campaigns, and media advertising is another, Dr. Lopach believes that political predisposition is primarily responsible for voting behavior. Thus, there is no credible evidence that corporate money is dominating citizen voices to the detriment of Montana's ballot initiative political process.

Dr. Lopach's testimony was echoed by Dr. Herbert Alexander, former director of the Citizens Research Foundation and professor emeritus of political science at the University of California, Berkeley. Dr. Alexander testified that neither money nor media advertising is the principal determinant of outcome in ballot issue elections. Dr. Alexander believes that Initiative 125 makes bad public policy because it removes a significant voice (i.e., that of corporations) which should be heard during ballot issue campaigns.

Secretary of State Mike Cooney, the State of Montana's Chief Election Officer, testified that there is no evidence of corruption in Montana politics in the form of buying or selling votes or tampering with election results. There is no evidence that corporate contributions or expenditures made in connection with ballot issues have reduced voter turnout or caused voter falloff on the ballot. Instead, the ballot issues in which the most money has been expended generally have had the highest voter participation.

Defendants likewise presented documentary evidence and witnesses, including Ed Argenbright, Joseph Kerwin, Dulcy Hubbert, Robert Shepard, Dennis Alexander, C.B. Pearson, Tony Jewett, Stan Frasier, John Deardourff, Mike Cooney, Samantha Sanchez, and William Chaloupka.

Dr. Robert Shepard, a Helena Physician who was one of the proponents of Initiative 115, testified regarding the difficulties the I-115 citizens' group faced in communicating their message regarding the I-115 tobacco tax. There is no doubt that Dr. Shepard was thoroughly disenchanted by the experience of campaigning against the campaign machine funded by out-of-state tobacco companies. Regrettably, Dr. Shepard testified that he will not work for another ballot issue campaign as a result of his experience with I-115. On cross-examination, Plaintiffs questioned Dr. Shepard whether proponents' failure to convince the voters to support I-115 might have been due in part to proponents' mistakes, questioning whether proponents' strategy might have been poorly planned,

whether proponents' political experience was insubstantial, and whether proponents' fund-raising techniques might have been inadequate.

The court also received testimony from Tony Jewett, executive director of the Montana Wildlife Federation, who testified regarding his experience in 1980 as a proponent of Initiative 87, a recycling initiative, and his involvement in Initiative 122, a clean water initiative. Mr. Jewett testified to feeling discouraged by his experiences with I-87 and I-122 because citizen proponents could not raise comparable funds to purchase media advertising as could their corporate opponents. Likewise, Mr. Stan Frasier testified to his experience as the Helena area captain of Initiative 122. From that experience, Mr. Frazier feels that citizens cannot win against corporate money in ballot issue campaigns.

John Deardourff testified regarding a survey taken by his polling firm which indicates that Montana citizens are displeased generally because of their perception of excessive corporate spending during ballot issue campaigns.

On direct examination by Defendant-Intervenor, Secretary of State Mike Cooney testified that he believes that corporate dollars are corrupting Montana's ballot initiatives and causing people to walk away from that political process. Secretary Cooney testified that I-125 brings reasonable limits to excessive spending, levels the playing field for citizens and corporations, and promotes an equal amount of communication from both sides. However, when questioned by Plaintiffs' counsel, Secretary Cooney

acknowledged that voter statistics do not show that Montanans are turning away from the ballot initiative process or elections in general.

Ms. Samantha Sanchez is the executive director of the National Institute on Money in State Politics. Ms. Sanchez claims to be an expert in the area of campaign contributions, and she studies the comparative rations of campaign contributions by analyzing contributions patterns, source, and quantity. Ms. Sanchez testified regarding contributions from out-of-state corporations in certain ballot issue elections compared to overall contributions and expenditures and compared to contributions and expenditures in other statewide and local elections.

Dr. William Chaloupka opined that (expensive) repetitive media advertising works and that political campaigns rely upon rhetoric and imagery, communicated by various media, to persuade voters to adopt a particular point of view. Dr. Chaloupka, a professor of political science at the University of Montana, has not specialized in the area of Montana ballot initiatives.

The court also received testimony from witness C.B. Pearson, a former executive director of Common Cause of Montana, and the campaign manager for Initiates 114, 118, and 125. Mr. Pearson is quite familiar with Montana's ballot initiative process, having personally participated in that process and having authored a monograph on the subject, "Big Money in Montana Ballot Campaigns (1982-1994)."

Mr. Pearson testified that he believes that the domination of corporate dollars is an abuse of the ballot initiative process and that corporate money discourages

citizens from proposing ballot issues. Specifically, Mr. Pearson testified that his analysis of Montana ballot issue elections shows that in nine initiatives wherein proponents were outspent by a 2/3 margin, seven of the nine initiatives (77%) were defeated. On cross-examination, Plaintiffs showed that when all ballot initiatives are considered wherein one side outspend the other side by a 2/3 margin, the side outspending won ten times and lost nine times.

Discussion

Having considered all the evidence submitted by the parties, the court finds Plaintiffs' evidence to be credible and persuasive. The court accepts the expert testimony provided by Dr. Lopach, who asserted there is no corruption or appearance of corruption in Montana ballot issue elections and that this Montana political process is healthy and of sound integrity. The court accepts the testimony of both Drs. Lopach and Alexander that many factors influence election outcome, particularly the political values, predispositions, and party loyalty of the voters, and that neither money nor media advertising is the sole or even the single most important variable controlling election outcomes. The court accepts the testimony of Plaintiffs' witnesses that Initiative 125 deprives corporations of the ability to communicate their political views during ballot issue campaigns.

The court finds the defense witnesses who testified regarding their participation in ballot issue campaigns to be sincerely motivated and public-spirited persons. Some

of these witnesses appear to have had unfortunate experiences by being involved in issue campaigns in which their sides lost and the other side had a disproportionate amount of funds. Apparently these witnesses have made the leap in logic that they lost solely because of the opposing side's funds, which the court considers to be an unwarranted but all too human conclusion. The collective sincerity of these witnesses inclines the court to a sympathetic view of their testimony, but they simply have not proven their contention by a preponderance of the evidence.

Of course money can and does have a potential effect on the outcome of elections. It is one of many factors. Multiple variables other than money and media influence election outcomes Montana ballot issue elections are not corrupted by the political expressions of corporations. The ballot issue process in Montana is health and not corrupt. Montana has no compelling state interest which would justify the abridgement of First Amendment rights imposed by Initiative 125.

The court concludes first and foremost, that Initiative 125, perhaps facially and certainly as applied, infringes upon the First Amendment rights of speech and association of the Plaintiffs and others subject to the prohibitions contained therein. Initiative 125 is not narrowly tailored to address only the campaign contributions and expenditures of large corporations. The reported aim of its drafters was to catch the big fish – shut off the large campaign warchests. But the net cast by Initiative 125 arguably also catches tens of thousands of little fish, individual Montanans who have banded together to enhance their political speech through organizations such

as the Montana Education Association, the Montana Stockgrowers Association, the Montana Wool Growers Association, the Montana Chamber of Commerce, the Montana Farm Bureau, the Montana Hospital Association, the Montana Medical Association, the Montana Taxpayers' Association, and others.

"A major purpose of [the First] Amendment [is] to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S 214, 218 (1966). The First Amendment therefore protects political expression, and in so doing "serves significant societal interests" and "often protects interests broader than those of the party seeking their vindication. . . . " *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 766 (1978). Thus, the proper question is whether a particular type of expression deserves First Amendment protection. *Id.*

Requiring corporations to fund ballot issue campaign speech through separate, segregated funds (consisting of voluntary contributions from employees, officers, directors, and shareholders), as is required by Initiative 125, deprives corporations of their ability to communicate political ideas directly to the electorate. The corporate voice is silenced. Initiative 125 chills impermissibly the speech and association rights of corporations and their officers and employees. Initiative 125 precludes corporations from directly resisting potential laws that could put them out of business. Requiring shareholders to fight the corporation's battles is an ineffective and illegal substitution for corporate speech rights. Perhaps almost as important, Initiative 125 prevents the electorate from being exposed to diverse viewpoints on public policy issues.

The State of Montana, which is represented by Defendant and Defendant-Intervenor, must show a compelling state interest to justify a significant infringement of core First Amendment rights. *Colorado Repub. Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 609 (1996). Leveling the playing field by equalizing the strength of citizen speech relative to corporate speech is inconsistent with First Amendment purposes and principles. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). To accomplish the necessary showing, the State must demonstrate the existence or appearance of corruption, which the court defines to include real harm to the integrity of Montana's ballot initiative process. Real harm does not include "wasteful and excessive campaign spending." *Colorado Republican Federal Campaign Committee*, 518 U.S. at 617. While it may be conceivable that corporations could overwhelm the political speech of individual citizens in a particular case to such a degree that the integrity of the ballot initiative process itself is damages, *see Austin v. Michigan Chamber of Commerce*, 494 U.S 652, 661 (1990), the meager anecdotal evidence presented by the Defendants wholly fails to prove that such has occurred in Montana. The State has failed to show that corporate contributions or expenditures in ballot initiate campaigns have had any adverse effect on the integrity of Montana's political process. Specifically, the State has failed to produce evidence that would support a judicial finding that corporate wealth has dominated citizen voices to the detriment of the ballot initiative process.

Corporations are therefore entitled to defend their economic interests by resorting to the corporate treasury to fund their participation in ballot initiative campaigns.

Like individuals, unions, and associations, corporations are entitled to attempt to shift public opinion and voting behavior to favor the corporate point of view, and in fact this is the primary purpose of all political speech, *see Bellotti*, 435 U.S. at 790. It is up to the voters to determine whether they approve or disapprove of a corporation's point of view. The purpose of the First Amendment is to allow "each person [to] decide for him or herself the ideas and beliefs deserving of expression, consideration and adherence." *Turner Broadcasting System, Inc. v. Federal Communication Commission*, 512 U.S. 622, 641 (1994).

The popular sentiment among Montana voters may be that there is too much corporate money influencing ballot issue campaigns and also that it is exceedingly difficult for ordinary citizens to participate successfully in some ballot issue campaigns. However, the law of the United States is that political speech is protected by the First Amendment, and this rule of law benefits all Montanans. The court is sensitive to the complaint that I-125 represents the will of the people. As a matter of law, however, it is simply not relevant that Initiative 125 was enacted by the voters rather than the legislature, "because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation." *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295 (1981).

In order to promote open and informed discussion of public affairs, the First Amendment seeks to "protect unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). Under the law of the United States, that protection is

granted to political speech without regard to its source, whether individual, corporation, union, or other association. Freedom of speech regarding public affairs is one of the cornerstones of self-government. "And self-government suffers when those in power suppress competing views on public issues 'from diverse and antagonistic sources.' " *New York Times Co. v. Sullivan*, 376 U.S 254, 266 (1964) (*quoting Associated Press v. United State*, 326 U.S. 1, 20 (1945)).

Accordingly,

IT IS HEREBY DECLARED that Initiative 125 is unconstitutional and therefore null and void, with no legal force or effect. The State of Montana is directed to cease its enforcement of the provisions of Initiative 125. Judgment shall be entered in Plaintiffs' favor in both *Montana Chamber* and *Montana Mining Ass'n*, although in the latter case the court denies the Plaintiffs' preliminary injunction notion as to Initiative 137 because the relief sought was premature as of the close of evidence.

Each party shall bear its own fees and costs.

IT IS FURTHER ORDERED that the complaint in *Montana Chamber* is DISMISSED as to Montana Education Association for its lack of standing to sue.

The Clerk is directed forthwith to notify the parties of entry of this order.

Done and dated this 20th day of November, 1998.

/s/ Charles C. Lovell
CHARLES C. LOVELL
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MONTANA CHAMBER OF COMMERCE; SLETTEN CONSTRUCTION; LEHRKIND'S INC.; KALISPELL AREA CHAMBER OF COMMERCE; MONTANA HOSPITAL ASSOCIATION; MONTANA FARM BUREAU; MONTANA EDUCATION ASSOCIATION, Plaintiffs-Appellees, vs. ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices, Defendant, and LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND AND CITIZENS FOR 1-125, Defendant-Intervenor-Appellant.	No. 98-36256 D.C. No. CV-97-00006-CCL ORDER FILED FEB 20 2001
MONTANA MINING ASSOCIATION; NORTHWEST MINING ASSOCIATION; COMMUNITIES FOR A GREAT NORTHWEST; GOLDEN	No. 98-36257 D.C. No. CV-98-00037-CCL

SUNLIGHT MINES, INC., YELLOW BAND BOLD, INC., CONTINENTAL LIME, INC.,

Plaintiffs-Appellees,

vs.

ED ARGENBRIGHT; MIKE COONEY,

Defendants,

and

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND AND CITIZENS 1-125,

Defendant-Intervenor-Appellant.

MONTANA MINING ASSOCIATION; NORTHWEST MINING ASSOCIATION; COMMUNITIES FOR A GREAT NORTHWEST; GOLDEN SUNLIGHT MINES, INC.; YELLOW BAND GOLD, INC.; CONTINENTAL LIME, INC.,

Plaintiff-Appellees,

vs.

ED ARGENBRIGHT

Defendant-Appellant,

and

No. 98-36261

D.C. No. CV-98-00037-CCL

MIKE COONEY,

Defendant,

and

LEAGUE OF WOMEN NOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND AND CITIZENS FOR I-125,

Defendant-Intervenor,

MONTANA CHAMBER OF COMMERCE; SLETTEN CONSTRUCTION; LEHRKIND'S INC.; KALISPELL AREA CHAMBER OF COMMERCE; MONTANA HOSPITAL ASSOCIATION; MONTANA FARM BUREAU; MONTANA EDUCATION ASSOCIATION,

Plaintiffs-Appellees,

vs.

ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices,

Defendant-Appellant,

and

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG

No. 98-36266

D.C. No. 97-00006-CCL

2030 FUND AND CITIZENS FOR I-125,

Defendant-Intervenor.

MONTANA MINING ASSOCIATION,

Plaintiff,

and

NORTHWEST MINING ASSOCIATION; COMMUNITIES FOR A GREAT NORTHWEST; CONTINENTAL LIME, INC.,

Plaintiffs-Appellants,

vs.

ED ARGENBRIGHT; MIKE COONEY,

Defendants-Appellees,

and

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND AND CITIZENS FOR I-125,

Intervenor-Appellee.

No. 99-35032

D.C. No. CV-98-00037-CCL

MONTANA MINING ASSOCIATION,

Plaintiff,

and

No. 99-35033

D.C. No. CV-97-00037-CCL

NORTHWEST MINING ASSOCIATION; COMMUNITIES FOR A GREAT NORTHWEST; CONTINENTAL LIME, INC.,

Plaintiffs-Appellees,

vs.

ED ARGENBRIGHT,

Defendant,

and

MIKE COONEY,

Defendant-Appellant.

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND AND CITIZENS FOR I-125,

Intervenor.

Before: RYMER, HAWKINS, and McKEOWN, Circuit Judges.

A majority of the panel has voted to deny the petition for rehearing and petition for rehearing en banc. Judge Hawkins voted to grant the petition for rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc. An active judge called for an en banc vote, and a majority of the active judges of the court has

voted to deny the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and petition for rehearing en banc are DENIED.

Mont. Code Ann. § 13-35-227. Prohibited contributions from corporations

(1) (a) Except as provided in subsection (4), a corporation may not make a contribution or an expenditure in connection with a candidate, a ballot issue, or a political committee that supports or opposes a candidate, a ballot issue, or a political party.

(b) For purposes of this section, "corporation" refers to for-profit and nonprofit corporations.

(2) A person, candidate, or political committee may not accept or receive a corporate contribution described in subsection (1).

(3) This section does not prohibit the establishment or administration of a separate, segregated fund to be used for making political contributions or expenditures if the fund consists only of voluntary contributions solicited from an individual who is a shareholder, employee, or member of the corporation.

(4) The provisions of subsection (1) prohibiting corporate contributions to or expenditures in connection with a ballot issue do not apply to a nonprofit corporation formed for the purpose, among others, of promoting political ideas and that:

(a) does not engage in business activities;

(b) has no shareholders or other affiliated persons who have a private claim on the corporation's assets or earnings;

(c) does not accept foreign or domestic for-profit corporations as members; and

(d) does not accept in the aggregate more than 5% annually of its total revenue from foreign or domestic for-profit corporations.

(5) A person who violates this section is subject to the civil penalty provisions of 13-37-128.

Mont. Code Ann. § 13-37-128. Cause of action created

(1) A person who intentionally or negligently violates any of the reporting provisions of this chapter is liable in a civil action brought by the commissioner or a county attorney pursuant to the provisions outlined in 13-37-124 and 13-37-125 for an amount up to $500 or three times the amount of the unlawful contributions or expenditures, whichever is greater.

(2) A person who makes or receives a contribution or expenditure in violation of 13-35-225, 13-35-227, 13-35-228, or this chapter is liable in a civil action brought by the commissioner or a county attorney pursuant to the provisions outlined in 13-37-124 and 13-37-125 for an amount up to $500 or three times the amount of the unlawful contribution or expenditure, whichever is greater.

Mont. Code Ann. § 82-4-390. Cyanide heap and vat leach open-pit gold and silver **mining** prohibited

(1) Open-pit **mining** for gold or silver using heap leaching or vat leaching with **cyanide** ore-processing reagents is prohibited except as described in subsection (2).

(2) A mine described in this section operating on November 3, 1998, may continue operating under its existing operating permit or any amended permit that is necessary for the continued operation of the mine.

Fed. R. Civ. Pro. Rule 52. Findings by the Court; Judgment on Partial Findings

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) for this rule.

* * *

Fed. R. Evid. Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice of requested by a party and supplied with the necessary information.

* * *

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MONTANA MINING ASSOCIATION, NORTHWEST MINING ASSOCIATION, COMMUNITIES FOR A GREAT NORTHWEST, GOLDEN SUNLIGHT MINES, INC., YELLOW BAND GOLD, INC. AND CONTINENTAL LIME, INC., Plaintiffs, v.	CV 98-37-H-CCL COMPLAINT FOR DECLARATORY RELIEF (Filed Sep-1 1996)

ED ARGENBRIGHT, in his official capacity as Montana Commissioner of Political Practices, MIKE COONEY, in his official capacity as Montana Secretary of State,

Defendants.

NOW COME the Plaintiffs, by and through their respective counsel, and seek an order of declaratory judgment pursuant to 28 U.S.C. § 2201-02, finding that § 13-35-227, MCA, (as amended by Montana Initiative I-125 and modified by a subsequent order of this Court) is unconstitutional as applied to Plaintiffs in that it impermissibly restricts their First Amendment rights of free speech and freedom of association with respect to Plaintiffs' desire to oppose Montana Ballot Initiative I-137, an initiative currently certified and on the ballot for the November 1998 general election.

JURISDICTION & VENUE

1. This Court has jurisdiction over this matter pursuant to Article III of the United States Constitution and 28 U.S.C. § 1331, as it is a civil action arising under the Constitution and Laws of the United States. Venue is appropriate under 28 U.S.C. § 1391(b) and local rule 105-3 because defendants both may be found within this Division of this District.

PLAINTIFFS

2. Some Plaintiffs are for-profit mining corporations, some of which now utilize or seek to utilize the cyanide leach process to extract gold, silver and other valuable

minerals from mined ore in the State of Montana. Others are not-for-profit associations (representing for-profit corporations and individuals) transacting business in Montana.

A. The Montana Mining Association

3. Plaintiff, the Montana Mining Association ("MMA") is a not-for-profit corporation organized under the Montana Nonprofit Corporation Act, Title 35, Part 2, Montana Code Annotated, with its principal office in Helena, Montana.

4. The members of the MMA include for-profit mining corporations, individuals, and for-profit corporations and individuals that serve the Montana mining industry. Some its members utilize the cyanide leach process to mine metallic ore.

5. The MMA receives more than 5% of its income from for-profit corporations. Accordingly, it is barred under Montana campaign laws from making direct contributions to political committees or making direct expenditures in opposition to I-137.

6. The MMA wishes to make direct contributions to political committees and/or make direct expenditures in opposition to I-137.

B. The Northwest Mining Association

7. The Northwest Mining Association ("NWMA") is a not-for-profit trade association incorporated under the laws of the State of Washington.

8. The members of the NWMA include for-profit mining corporations, individuals and for-profit corporations and individuals that serve the mining industry.

9. Its members include entities that are incorporated, are authorized to do business, or are citizens of Montana. Some of its members use the cyanide leach process to mine and recover metallic ores and minerals.

10. The NWMA receives more than 5% of its annual revenue from for-profit corporations. Accordingly, it is barred under Montana campaign laws from making direct contributions to political committees or making direct expenditures in opposition to I-137.

11. The NWMA wishes to make direct contributions to political committees and/or make direct expenditures in opposition to I-137.

C. Communities For a Great Northwest

12. Communities For a Great Northwest, Ltd ("CGN") is a non-for-profit corporation organized under the laws of the State of Montana and recognized as a 501(c)(3) organization by the United States Internal Revenue Service.

13. CGN's members include family owned and operated corporations and individual employees of small, family owned corporations and employees of larger corporations.

14. CGN's members could bring suit in their own right, but have exercised their constitutional rights to associate together and pool their resources under their association.

15. CGN was organized to educate its members and the general public regarding issues affecting natural resource dependent industries such as mining, logging, farming and ranching.

16. CGN receives more than 5% of its annual revenue from for-profit corporations. Accordingly it is barred under Montana campaign laws from making direct contributions to political committees or making direct expenditures in opposition to I-137.

17. CGN wishes to make direct contributions to political committees and/or make direct expenditures in opposition to I-137.

D. Golden Sunlight Mines, Inc.

18. Plaintiff, Golden Sunlight Mines, Inc., ("Golden Sunlight") is a for-profit mining corporation incorporated in California and authorized to do business in Montana. Golden Sunlight has facilities and operations in Whitehall, Montana.

19. Golden Sunlight has operated its Whitehall mine since 1982. Golden Sunlight utilizes the cyanide leach process to extract gold, silver and other valuable minerals from the ore it mines at the Whitehall facility.

20. Since it began operations at Whitehall, Golden Sunlight's mining permit has been amended ten times. Its most recent permit amendment was granted by the State of Montana in July 1998.

21. Golden Sunlight anticipates that it will locate further gold deposits in (or near) its present operations. Accordingly, it believes it will seek an eleventh permit amendment to mine ore utilizing the cyanide leach process.

22. If I-137 passes, Golden Sunlight will be prohibited from obtaining any further permits for mining.

23. The blanket prohibition against future mine expansion would result in loss of capital investment in the Whitehall mine, and loss of the opportunity to recover return on the capital investment.

Golden Sunlight's Tenth Permit Amendment

24. In July, 1998, Golden Sunlight received a permit amendment allowing expansion of the mine. This expansion will provide for mine operations for seven additional years.

25. The Montana Environmental Information Center ("MEIC"), a proponent of I-137, has indicated an intent to challenge the July, 1998 permit.

26. If MEIC's challenge is successful and the permit is revoked, and if I-137 passes, Golden Sunlight would be prohibited from subsequent reconsideration of this permit which incorporates the cyanide leach process.

27. In that event, the mine would be shut down and capital investment by Golden Sunlight would be lost along with the opportunity to further realize a return on the capital investment in the Whitehall mine.

28. Golden Sunlight is a for-profit corporation. Accordingly, it is barred under Montana campaign laws from

making direct contributions to political committees and/or making direct expenditures in opposition to I-137.

29. Golden Sunlight wishes to make direct contributions to political committees that oppose I-137 and/or wishes to make direct expenditures in opposition to I-137.

E. Yellow Band Gold, Inc.

30. Yellow Band Gold, Inc. ("Yellow Band Gold") is a Montana corporation organized under the Montana Business Corporation Act, § 35-1-112, et seq., MCA.

31. Yellow Band Gold is in the business of developing and operating a small gold mining property in Beaverhead County, Montana.

32. Yellow Band Gold is applying for, but has not yet obtained, a permit to mine gold at its operation utilizing the cyanide leach process.

33. If I-137 passes, Yellow Band Gold will not be able to obtain a permit to mine gold at its operation utilizing the cyanide leach process.

34. Yellow Band Gold is a for-profit corporation. Accordingly, it is barred under Montana campaign laws from making direct contributions to political committees and/or making direct expenditures in opposition to I-137.

35. Yellow Band Gold would like to make expenditures in opposition to I-137 and/or contribute to political committees opposing I-137.

F. Continental Lines, Inc.

36. Plaintiff Continental Lime, Inc., ("Continental Lime") is a Utah corporation authorized to do business in Montana under the Montana Business Corporation Act, § 35-1-112, et seq., MCA.

37. Continental Lime is in the business of producing high quality calcium quicklime and hydrated lime for, among other uses, by the Montana mining industry to control acid rock drainage.

38. Continental Lime is a for-profit corporation. Accordingly, it is barred under Montana campaign laws from making direct contributions to political committees and/or making direct expenditures in opposition to I-137.

39. Continental Lime would like to make expenditures in opposition to I-137 and/or make contributions to political committees in opposition to I-137.

DEFENDANTS

40. Pursuant to § 13-37-111, MCA, Defendant, Ed Argenbright, in his official capacity as Montana Commissioner of Political Practices ("Commissioner"), is charged by Montana law with the responsibility of investigating complaints and enforcing Montana's campaign and election laws.

41. Pursuant to § 13-1-201, MCA, Defendant, Mike Cooney, in his official capacity as Montana Secretary of State ("Secretary"), is the chief election officer of the State of Montana. He is, by law, charged with the responsibility

of administering the statewide ballot election process. *See* § 13-27-501, *et seq.*, MCA.

THE I-137 INITIATIVE

42. Montana Ballot Initiative I-137 ("I-137") was certified to the Governor of Montana on July 17, 1998 for submission to the Montana voters on the November 3, 1998 ballot. If passed, I-137 would prohibit the State of Montana, from the date of its passage, from issuing mining permits to mining companies or individuals that would incorporate the use of the cyanide leach process in their mining operations. (See attached text of I-137 as Ex. A).

43. The cyanide leach process is a widely accepted and long used method of extracting metals from low grade metallic ore.

44. If I-137 passes, the prohibition of future use of this process would have a direct impact on Plaintiffs, the economy of the State of Montana and the future of the mining industry in Montana.

MONTANA CAMPAIGN FINANCE LAW

45. Section 13-35-227, MCA, as it now exists (subsequent to this Court's Order of Partial Summary Judgment dated February 18, 1998 in Cause No. CV 97-6-H-CCL) prohibits for-profit corporations and certain not-for-profit corporations from directly contributing funds to a campaign committee supporting or opposing a ballot issue, or from making a direct expenditure for or against a ballot issue.

46. Section 13-35-227, MCA, was amended in 1996 by I-125, then by the 1997 Montana Legislature (HB 575). It now reads, subsequent to this Court's Order of Partial Summary Judgment in the above referenced cause (**hereinafter referred to as** "I-125"):

> § 13-35-227. **Prohibited Contributions from Corporations.**
>
> (1) (a) Except as provided in subsection (4), a corporation may not make a contribution or an expenditure in connection with a candidate, a ballot issue, or a political committee which supports or opposes a candidate, a ballot issue, or a political party.
>
> (b) For purposes of this section, "corporation" refers to for-profit and nonprofit corporations.
>
> (2) A person, candidate, or political committee may not accept or receive a corporate contribution described in subsection (1).
>
> (3) This section does not prohibit the establishment or administration of a separate, segregated fund to be used for making political contributions or expenditures if the fund consists only of voluntary contributions solicited from an individual who is a shareholder, an employee, or a member of the corporation.
>
> (4) The provisions of subsection (1) prohibiting corporate contributions to or expenditures in connection with a ballot issue do not apply to a nonprofit corporation formed for the purpose, among others, of promoting political ideas and that:
>
> (a) does not engage in business activities;

(b) has no shareholders or other affiliated persons who have a private claim on the corporation's assets or earnings;

(c) does not accept foreign or domestic for profit corporations as members; and

(d) does not accept in the aggregate more than 5% annually of its total revenue from foreign or domestic for profit corporations.

§ 13-35-227, MCA.

47. Defendant Commissioner has stated that he will enforce I-125 against for-profit corporations or not-for-profit corporations (such as Plaintiffs) if they, or other business entities or organizations similarly situated to them contribute directly to a campaign committee opposing or supporting a ballot issue or directly make an expenditure for or against a ballot issue. (*See* attached letter from Commissioner Argenbright as Ex. B).

COUNT I

FREEDOM OF SPEECH, EXPRESSION AND ASSOCIATION

48. Plaintiffs reallege, and incorporate as though fully set forth herein paragraphs 1-47 of this Complaint.

49. The Plaintiffs, and their respective for-profit and not-for-profit members have a constitutionally protected right to engage in political speech and association and to make contributions and expenditures in support of or in opposition to ballot issues.

50. The degree of protection afforded to the Plaintiffs constitutionally protected rights of free speech and association is heightened when their assets and way of life are threatened, as they are by the proposed initiative.

51. The threatened enforcement of the civil penalties for violating I-125, forces Plaintiffs to choose between either engaging in their rights of free speech and association to protect their economic interests (thus facing civil enforcement proceedings against them) or foregoing the exercise of those rights to avoid such enforcement proceedings and risk the loss of assets and a way of life.

52. I-125 impermissibly chills the Plaintiffs' rights to engage in political speech and association.

53. I-125, therefore, abridges the First Amendment rights of the Plaintiffs and their respective for-profit and not-for-profit corporate members.

WHEREFORE, Plaintiffs request relief as follows:

1) That the Court order such preliminary injunctive relief as may be requested by separate application therefore;

2) That the Court issue a declaratory judgment ruling and order which declares I-125 to be a violation of the United States Constitution's First Amendment right to free speech as applied to Plaintiffs or other persons, corporations or associations similarly situated, together with a permanent injunction against enforcement of I-125; and

3) That the Court provide such other and further relief as this Court deems proper under the circumstances.

Respectfully submitted this 1st day of September, 1998.

GOUGH, SHANAHAN, JOHNSON & WATERMAN

/s/ Alan Joscelyn
One of the Attorneys for Plaintiffs Golden Sunlight Mines, Inc.

MOUNTAIN STATES LEGAL FOUNDATION

/s/ J. Scott Detamore
One of the Attorneys for Plaintiffs the Montana Mining Association, Northwest Mining Association, Communities for a Great Northwest, Ltd. Yellow Band Gold, Inc. and Continental Lime, Inc.

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/s/ Dale R. Coebrell
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THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MONTANA MINING ASSOCIATION, et. al., Plaintiffs, v. ED ARGENBRIGHT, et al., Defendants	Civil Action No. CV 98-37-H-CCL **MOTION FOR PRELIMINARY INJUNCTION** FILED SEP 4 1998

Plaintiffs, Montana Mining Association (MMA), Northwest Mining Association (NWMA), Communities for a Great Northwest (CGN), Yellow Band Gold, Inc.,

and Continental Lime, Inc., through their attorneys, move this court for a preliminary injunction as set forth more fully in the *ad damnum* clause hereof, and as cause therefore show this court as follows:

1. Plaintiffs are corporations which are prevented by § 13-25-227, MCA, Montana ballot initiative I-125 (I-125), from making expenditures to educate the public concerning Montana ballot initiative I-137 (I-137), dealing with cyanide heap leaching, which will be on the statewide ballot in the November 1998 general election.

2. If I-137 is passed, Plaintiffs will suffer irreparable harm, as more fully set forth in these Plaintiffs' Brief, attached hereto and incorporated herein in full by reference.

3. I-125, as it applies to restrict Plaintiffs from participating in the public debate or making expenditures in connection with I-137 constitutes an unconstitutional burden on the freedom of speech and of association of Plaintiffs as guaranteed to Plaintiffs by the First Amendment to the U.S. Constitution and applied to the states by the Fourteenth Amendment.

4. Defendants cannot enunciate a compelling state interest justifying the limitations on Plaintiffs' speech and associational rights, and if they could, which is denied, I-125 is not a narrowly tailored remedy designed to accomplish the identified interest.

5. Plaintiffs will be irreparably damaged if the relief prayed for herein is not granted.

6. Plaintiffs have no adequate remedy at law.

7. Plaintiffs are likely to prevail on the merits of this case.

8. The balance of hardships favors Plaintiffs over Defendants.

9. Plaintiffs join in the Motion for Preliminary Injunction filed herein by Golden Sunlight Mines, and the Brief in Support thereof, and incorporate the same by reference, including the Affidavits or Declarations filed in support thereof.

10. Plaintiffs incorporate, in support of this Motion, their Brief attached hereto, and the Declarations of Jill Andrews, Laura Skaer, and Bruce Vincent, E.E. Gene Nelson and Elton Chorney, attached thereto.

WHEREFORE, Plaintiffs pray for an Order granting a Preliminary Injunction against the Defendants enjoining them and each of them as follows:

a. From enforcing the provision of I-125 against Plaintiffs or any other similarly situated corporate party, to prevent expenditures or other participation in the public debate and discussion of or concerning I-137; and/or

b. From conducting the vote on I-137 on the November 1998 statewide ballot, and ordering that the vote on said initiative be delayed until such time as this court issues a declaratory judgment ruling on the issue concerning whether I-125 violates Plaintiffs' constitutional rights and should be permanently enjoined with respect to I-137.

MOUNTAIN STATES LEGAL FOUNDATION

by /s/ J. Scott Detamore
William Perry Pendley
J. Scott Detamore
William Perry Pendley

Attorneys for Plaintiffs, MMA, NWM, CGN, Yellow Band Gold, Inc., and Continental Lime, Inc.

CERTIFICATE OF SERVICE BY MAIL

The undersigned certifies that he/she served a copy of the foregoing by facsimile transmission and by placing the same in the United States Mails, postage prepaid, properly addressed to the following, on the 4th day of September, 1998:

Ed Argenbright
Commissioner of Political Practices

Jim Scheier, Attorney for Ed Argenbright
Agency Legal Services Bureau

MOTION FOR PRELIMINARY INJUNCTION

[215] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA HELENA DIVISION

MONTANA CHAMBER OF COMMERCE, SLETTEN CONSTRUCTION COMPANY, LEHRKIND'S, INC., KALISPELL AREA CHAMBER OF COMMERCE, MONTANA HOSPITAL ASSOCIATION, MONTANA FARM BUREAU FEDERATION, MONTANA EDUCATION ASSOCIATION,

Plaintiffs,

-vs-

ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices,

Defendant,

and

I-125 PROPONENTS' COMMITTEE,

Defendant-Intervenor.

Civil Docket No. 97-6-H-CCL

TRANSCRIPT OF BENCH TRIAL PROCEEDINGS

Heard in Courtroom No. 551
United States Courthouse
301 South Park
Helena, Montana

October 14, 1998

9:17 a.m.

BEFORE THE HONORABLE CHARLES C. LOVELL

UNITED STATES DISTRICT JUDGE

Volume 2 of ___

[216] APPEARANCES:

PRESENT ON BEHALF OF THE PLAINTIFFS, MONTANA CHAMBER OF COMMERCE, SLETTEN CONSTRUCTION COMPANY, LEHRKIND'S INC., KALISPELL AREA CHAMBER OF COMMERCE, MONTANA HOSPITAL ASSOCIATION, MONTANA FARM BUREAU FEDERATION,

MONTANA EDUCATION ASSOCIATION:

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PRESENT ON BEHALF OF THE DEFENDANT, ED ARGENBRIGHT in his official capacity as Commissioner of Political Practices:

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PRESENT ON BEHALF OF THE DEFENDANT-INTERVENOR, I-125 PROPONENTS' COMMITTEE:

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and

MS. BRENDA WRIGHT
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[217] COLLOQUY

The following proceedings were had:

MORNING SESSION

Wednesday, October 14, 1998
Beginning at 9:17 a.m.

THE COURT: Be seated, please. Good morning.

We're ready for the second day of trial in Civil 97-6.

Counsel are present. We're ready for your next witness, Mr. Kaleczyc.

MR. KALECZYC: Thank you, Your Honor. Call Mr. Jerome Anderson.

JEROME ANDERSON, having been called as a witness on behalf of the plaintiffs, being first duly sworn according to law, was examined and testified as follows:

CLERK OF COURT: Please state your name and spell it.

THE WITNESS: Jerome Anderson.

CLERK OF COURT: Could you spell your first name?

THE WITNESS: J-E-R-O-M-E.

CLERK OF COURT: Is that Anderson with a S-O-N or S-E-N?

[218] ANDERSON/DIRECT BY KALECZYC

THE WITNESS: Yes, ma'am. S-O-N.

CLERK OF COURT: Thank you. You may be seated.

DIRECT EXAMINATION

BY MR. KALECZYC:

Q Good morning, Mr. Anderson.

A Good morning, sir.

Q Would you tell the court your occupation, please.

A I'm an attorney at law.

Q And where do you practice law?

A Helena, Montana.

Q And generally describe to the court the nature of your law practice.

A At the present time, I represent clients at the legislative process before the Montana legislature. I do administrative law practice for clients here in Helena.

State government. Very little amount of litigation. Some business legal work.

In the past, I've done a great deal of litigation, labor law, a great deal of corporate business work.

Q And how long have you been engaged in the practice of law?

A Just over 50 years.

Q And did you practice in another city besides Helena?

A Billings, Montana for 40 years.

[219] ANDERSON/DIRECT BY KALECZYC

Q I'm sorry. How long?

A Billings, Montana for 40 years.

Q Have you ever been elected to public office?

A I served four sessions of the Montana legislature in the House eight years.

Q And did you hold any leadership positions while you were in the legislature?

A I was majority floor leader during one session. I was floor whip during several sessions.

Q Have you ever held any political offices?

A Yes. I've – I guess, run the gamut from precinct committee man to various levels of offices at a county level, including county chairman. I was legal counsel to one of the major parties here in Montana on a statewide

basis. I was vice chairman of the Republican Party for a period of time. Things of that nature.

Q Have you ever been involved with ballot issues?

A Yes. In two campaigns directly. In 1990, I was chairman and manager of the campaign against I-115; and in 1996, I held the same position in connection with the I-122 campaign.

Q Can you briefly describe for the court what are the responsibilities of a campaign manager in a ballot issue campaign?

A Well, you have the full responsibility for –

[220] ANDERSON/DIRECT BY KALECZYC

Q Excuse me, Mr. Anderson. You may want to move the microphone a little bit away from yourself. It's causing a little distortion.

A You have the full responsibility for the entire operation of the campaign from, everything from the original organizational effort, employing, of course, staff, setting up offices, putting together all of the facilities that you'll use during a campaign, employing consultants.

You have the responsibility for media buys, the responsibility for the development of all of the campaign material, the development of the campaign messages that you, of course, want to deliver to the public. All of the things that are associated with a campaign operation.

Q Have you considered the role of money in running a ballot issue campaign?

A Yes, I have. Certainly.

Q In your view, does the use of money in a ballot issue campaign corrupt the political process?

A No. I don't believe so.

Q What, in your opinion, is the most important factor in determining which side will win in a ballot campaign?

A I think the development of a credible, concise, and understandable message regarding your position concerning the ballot issue is the most critical element of a campaign.

Q In your view, Mr. Anderson, can any amount of money

[221] ANDERSON/DIRECT BY KALECZYC

compensate for a campaign message that the electorate does not want to accept?

A No, I don't believe so.

Q I'd like to talk with you for a few minutes about kind of mechanics and components of a campaign.

MR. KALECZYC: If I may, Exhibit 96.

In addition, Your Honor, we have Exhibit 96 also blown up as a demonstrative exhibit for the convenience of the court and witness.

CLERK OF COURT: Sorry, I just blew a cart.

MR. KALECZYC: I think it will be all right for purposes of the witness if he just –

Q (BY MR. KALECZYC) Can you see that all right, Mr. Anderson?

A Move it a little closer.

Q Would you describe first, generically, what Exhibit 96 depicts.

A Well, it depicts the components that are the principal factors that you use during the course of the development of a campaign.

It – You want me to go through the –

Q Yeah. If you would now, sir, yes. If you would kind of comment upon those various factors.

A Starting with the beginning of the first factor, which is the development of the issue and position statements.

[222] ANDERSON/DIRECT BY KALECZYC

When you start a campaign organization, of course, to begin with, the critical things are the employment of the campaign manager, the development of staff, employment of consultants, and an analysis of the ballot issue that's involved.

If you're an opponent of the ballot issue, of course, you want to analyze the issue to determine the impact upon the people that you're representing and that have an interest in opposition to the ballot issue.

You develop a budget and raise the initial funding that's necessary to get the campaign off the ground. And then start polling, a polling effort to determine exactly

where you are with regard to the level of interest in the ballot issue, what the public perception seems to be of the ballot issue; what seems to be at that time from the standpoint of a percentage of people that favor it as compared to opposing it; the reasons why people favor it, or the reasons why they oppose it. What arguments with respect to the issue seem to attract public interest.

And taking that information and plus the interests of your clients and other technical data that you gather, you begin to develop your campaign message and your position statements.

And during the course of this, of course, you're going through the process of identifying the activity of those who

[223] ANDERSON/DIRECT BY KALECZYC

are the proponents of the ballot issue to determine what their message is and what their activity consists of.

You then take the developed message and the information that you've put together and present it to focus groups to reach a determination of the acceptance or non-acceptance of the message that you've developed; whether the message is understandable and credible to the people that are receiving the message.

You identify those people who are going to be your supporters, the resources that are available through them. You, of course, are setting up at the same time, your campaign structure, opening campaign offices, employing staff and personnel, and then you're developing a grass-roots effort which is very important to a campaign,

consisting of people that are located throughout the state that can meet with people in Montana on a more personal basis, contacting local groups and local entities, raising support for your campaign.

You develop your campaign strategy. And, of course, go forward in addition to the initial budget that you've developed, create an additional budget which is predicated upon what you perceive to be the campaign expenses that you're looking forward to.

You prepare a timed event schedule so that you have throughout the course of the campaign, be it a five-month or

[224] ANDERSON/DIRECT BY KALECZYC

seven-month or whatever the period of time involved is, you have a series of events that you have scheduled, the periods of time when media buys would be made and so forth. You're developing coalitions, you're organizing opinion leaders in various areas of the state that support your effort. You're getting group endorsements.

In the I-122 campaign, of course, we got support resolutions from, I don't know how many groups across the state varying from county commissioners to local women's organizations to businesses, whatever.

You develop a speakers' bureau which is active in debating, active in appearing before local clubs and organizations in various areas. And meet with editorial boards of newspapers across the state.

We did a great deal of work in both campaigns with the local weekly papers. We had people that were designated to handle that specifically and nothing other than that.

You, of course, have press kits; you organize your direct mail activity, and then your campaign advertising and media buying. The campaign advertising involves not only just buying media material – or media space in newspapers and time on television and radio, but also the development of the methodology to be followed in getting your message through to the public through those sources.

Then, of course, at the tail end of the campaign, you

[225] ANDERSON/DIRECT BY KALECZYC

want to be sure that those people that are supporting you are registered to vote. And then you have a get-out-the-vote effort to be sure they get out and record their support for you in the election booth.

That's maybe a longer or a brief description.

Q Okay.

With respect to that general description, would those components to a ballot campaign, in your view, apply equally or be applicable both to a proponents' campaign and an opponents' campaign?

A I believe so.

In addition, of course, if you're a proponent, you have at the very beginning of the effort your signature-

gathering effort and your drafting of an initiative component and so forth.

Q Do you have to use each of these components in every campaign?

A No. It, I think, depends on the type of issue that's involved; emotional impact of the issue; the importance of the issue; and the technical nature of the issue, and particularly in the I-122 campaign and to a considerable extent in the I-115 campaign. Both involved technical matters that were, I'm sure, difficult for the public to grasp at the beginning of the campaign. And because of that, there was a greater necessity for expenditure of funds

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[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MONTANA MINING ASSOCIATION, NORTHWEST MINING ASSOCIATION, COMMUNITIES FOR A GREAT NORTHWEST, YELLOW BAND GOLD, INC., CONTINENTAL LIME, INC., GOLDEN SUNLIGHT MINES, INC.,

Plaintiffs,

-vs-

ED ARGENBRIGHT, in his official capacity as Montana Commissioner of Political Practices, MIKE COONEY, in his official capacity as Montana Secretary of State,

Defendants,

and

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND, AND CITIZENS FOR I-125,

Defendants-Intervenors.

Civil Docket
No. 98-37-H-CCL

TRANSCRIPT OF BENCH TRIAL PROCEEDINGS

Heard in Courtroom No. 551
United States Courthouse

301 South Park
Helena, Montana
October 21 and 22, 1998

BEFORE THE HONORABLE CHARLES C. LOVELL
UNITED STATES DISTRICT JUDGE

* * *

[96] ANDREWS/Re-cross by Motl

You may step down.

THE WITNESS: Thank you, Your Honor.

THE COURT: Thank you.

Next witness, please.

(Witness excused from the witness stand.)

MR. COCKRELL: Your Honor, we'd call Jerome Anderson, please.

JEROME ANDERSON, having been called as a witness on behalf of the plaintiffs, being first duly sworn according to law, was examined and testified as follows:

CLERK OF COURT: Please state your full name and spell your last name.

THE WITNESS: Jerome Anderson. A-N-D-E-R-S-O-N.

CLERK OF COURT: Thank you.

MR. COCKRELL: Your Honor, as a way of moving this along, I've spoken with the other counsel, and I'm not going to go through any of the foundational information that was already established.

I would just have a few questions for Mr. Anderson on top of the others.

If I could, may I approach the witness, Your Honor?

THE COURT: Yes.

MR. COCKRELL: Show him an exhibit.

[97] J. ANDERSON/Direct by Cockrell

DIRECT EXAMINATION

BY MR. COCKRELL:

Q Mr. Anderson, could you turn to tab 6, please.

A Yes, I have that, counselor.

Q Could you describe that document.

A That is a page of the Helena Independent Record. I believe it's –

Q Actually, the date is on the second page.

A September 29th, 1998.

Q And if you'll look down in the bottom left-hand corner of page one, it concerns the ballot issues which are scheduled to be on the November 3rd general election.

Do you see that article?

A Yes, I do.

Q And does it discuss anything about the poll, at least at that time, as to Initiative 137?

A Yes, sir.

Q And what does it say, if you can find that, Mr. Anderson?

A It says that 50 percent of the Montanans polled favored Initiative 137; 29 percent of those polled opposed the initiative; while 21 percent had no opinion.

MR. COCKRELL: Your Honor, I would move to admit Plaintiffs' Exhibit No. 6.

THE COURT: Any objection?

[98] MR. SCHEIER: No objection, Your Honor.

MR. MOTL: No objection, Your Honor.

MR. WHYTE: No objection.

THE COURT: Exhibit 6 is admitted.

Q (BY MR. COCKRELL) Mr. Anderson, in your earlier testimony, which is now a part of this case, you testified that you had been the campaign manager on at least one or perhaps two campaigns and participated in some others?

A That is correct.

Q Based on your experience in managing those campaigns, do you have an opinion about whether a successful challenge could be mounted to I-137 now?

A I do have such an opinion.

Q What is that opinion?

A That opinion is that an effective campaign – It's too late to mount an effective campaign at this point in time.

MR. COCKRELL: Thank you.

I have no further questions, Your Honor.

THE COURT: Cross-examine. Mr. Scheier.

CROSS-EXAMINATION

BY MR. SCHEIER:

Q Good afternoon, Mr. Anderson.

A Good afternoon.

Q You have filed an affidavit in this lawsuit?

A I did, sir.

[99] J. ANDERSON/Cross by Scheier

Q And one of the chapter – paragraph 22 of that affidavit talked about one critical aspect of a campaign being media advertising campaign. Do you recall that?

A That's correct.

Q Would you tell us – tell the court how important a media advertising campaign is to an effective campaign to defeat an initiative?

A It is one of the elements of an effective campaign. It is certainly not the only element. There are a number of other elements that are requisites to an effective campaign.

MR. SCHEIER: May I approach the witness, Your Honor?

THE COURT: Yes.

Q (BY MR. SCHEIER) I'll show you paragraph 22 of your affidavit.

Could you please read that into the record.

A "Another critical aspect of the campaign is the media advertising program. This involves the costs of media with consultants, production of television and radio spots, production of newspaper ads, and placement of this media advertising. Using simply a week or ten days television and radio time immediately before the election is not effective. A consistent television and radio campaign that is continued for at least a four-week period is critical to the success of an election educational effort. TV time must [100] J. ANDERSON/Redirect by Cockrell

be pre-purchased as early as 90 days before us in order to obtain effective spot placement. All of the radio and newspaper time and space must be pre-purchased and prepaid."

MR. SCHEIER: Thank you, Your Honor.

I have no further questions.

THE COURT: Mr. Motl.

MR. MOTL: I have no questions, Your Honor.

THE COURT: And Mr. Whyte.

MR. WHYTE: I have no questions, Your Honor.

THE COURT: Any redirect?

MR. COCKRELL: Just one, Your Honor.

REDIRECT EXAMINATION

BY MR. COCKRELL:

Q Mr. Anderson, you'd agree that your affidavit contains a number of other paragraphs about other critical components to make up a successful campaign?

A That is correct.

Q Thank you.

MR. COCKRELL: Your Honor, that's all I have.

THE COURT: Any further re-cross?

MR. SCHEIER: No, Your Honor.

MR. MOTL: No, Your Honor.

MR. WHYTE: No, Your Honor.

THE COURT: You're getting off easily today, Mr. Anderson.

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[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MONTANA MINING ASSOCIATION, NORTHWEST MINING ASSOCIATION, COMMUNITIES FOR A GREAT NORTHWEST, YELLOW BAND GOLD, INC., CONTINENTAL LIME, INC., GOLDEN SUNLIGHT MINES, INC.,

Plaintiffs,

-vs-

ED ARGENBRIGHT, in his official capacity as Montana Commissioner of Political Practices, MIKE COONEY, in his official capacity as Montana Secretary of State,

Defendants,

and

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND, AND CITIZENS FOR I-125,

Defendants-Intervenors.

Civil Docket
No. 98-37-H-CCL

TRANSCRIPT OF BENCH TRIAL PROCEEDINGS

Heard in Courtroom No. 551
United States Courthouse

301 South Park
Helena, Montana
October 21 and 22, 1998

BEFORE THE HONORABLE CHARLES C. LOVELL
UNITED STATES DISTRICT JUDGE

* * *

[133] PEARSON/Direct by Cockrell

C. B. PEARSON, II, having been called as a witness on behalf of the plaintiffs, being first duly sworn according to law, was examined and testified as follows:

CLERK OF COURT: Please state your full name and spell your last name, please.

THE WITNESS: Charles Bernard Pearson, II. P-E-A-R-S-O-N.

CLERK OF COURT: Thank you.

THE WITNESS: Thank you.

DIRECT EXAMINATION

BY MR. COCKRELL:

Q Could you restate your name, please, Mr. Pearson.

A C.B. Pearson.

Q Thank you.

MR. COCKRELL: Your Honor, I'm not going to go through all the foundation material, since it's already in. I'll just supplement some of the questions that were already asked.

THE COURT: Very well.

Q (BY MR. COCKRELL) Mr. Pearson, I believe you've sat through most of the trial and have heard a

number of witnesses testify about factors that go into making an effective campaign; is that correct?

[134] A Yes, sir.

Q One of those factors would be an effective grass-roots organization; is that correct?

A One. Yes.

Q And another factor would be whether you can get persuasive or individual persons or groups to support your position; isn't that correct?

A That was testified to, yes.

Q And another factor would be the ability to speak at civic organizations such as Rotary Clubs or Kiwanis or other groups such as that; isn't that correct?

A Yes.

Q And another factor would be whether you got newspapers to publish editorials in support or opposition, whichever side you were on, of your position, Wouldn't that be another factor?

A Yes, sir.

Q And another factor would be whether you had advertising as part of your campaign; wouldn't that be correct?

A That would impact, yes.

Q That would be one of the factors?

And another factor would be whether you can do some type of direct mailing or handing out leaflets or something of that sort; wouldn't that be correct?

A That would be part of a campaign, yes.

* * *

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
HELENA DIVISION

MONTANA MINING ASSOCIATION, NORTHWEST MINING ASSOCIATION, COMMUNITIES FOR A GREAT NORTHWEST, GOLDEN SUNLIGHT MINES, INC., YELLOW BAND GOLD,	Cause No. 98-37-H-CCL

INC. and CONTINENTAL LIME, INC.,	)	
Plaintiffs,	)	PLAINTIFFS' APPLICATION FOR A PERMANENT INJUNCTION AND ORDER
v.	)	
ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices, and MIKE COONEY in his official capacity as Montana Secretary of State,	)	
Defendants, and	)	
I-125 PROPONENTS' COMMITTEE,	)	
Defendant-Intervenor.	)	

Plaintiffs apply to this Court for a permanent injunction and order, pursuant to Rule 65, Fed.R.Civ.P. and the All Writs Act, 28 U.S.C. § 1651(a): (1) finding the November 3, 1998 Montana general election invalid with respect to I-137 because improperly conducted, and voiding the election with respect to I-137, and (2) permanently enjoining the Secretary of State, in his capacity as the State's Chief Election Officer, and all other persons acting in concert or participation with him, from recognizing I-137 as having been approved by the voters and from including I-137 in his statement of canvass prepared pursuant to MCA 13-27-503 and from certifying the results of the

I-137 initiative election to the Governor and the legislative services division.[1]

Plaintiffs requested in their Complaint that the Court enter injunctive relief as requested in separate applications therefore. This Application is supported by the Plaintiff's Brief in Support of Application for Permanent Injunction and Order and Affidavit of Julie L. Wood filed herewith.

Respectfully submitted this 10th day of November, 1998.

CHRISTENSEN, MOORE,
COCKRELL & CUMMINGS, P.C.

_____

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Attorneys for Montana Mining
Association, Northwest Mining
Association, Communities for a

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[1] In a related case, *Montana Mining Association, et al. v. State of Montana, et al.*, CV-98-48-C-CCL, Montana Mining Association, Yellow Band Gold, Inc., and Majesty Mining, Inc. have filed an application for a temporary restraining order and preliminary injunction. In that application, the Plaintiffs requested that the Secretary of State be barred from preparing a statement of canvas and certifying the results of the vote on I-137 and that the Defendants be temporarily restrained from recognizing and enforcing I-137 until a preliminary injunction hearing could be held. The court need not act on that application if it grants the permanent injunction requested in this case.

Great Northwest, Yellow Band Gold, Inc. and Continental Lime, Inc.

MOUNTAIN STATES
LEGAL FOUNDATION

/s/ William P. Pendley
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CERTIFICATE OF SERVICE

I, _____, one of the secretaries of the law firm, GOUGH, SHANAHAN, JOHNSON & WATERMAN, do hereby certify that I served a copy of the foregoing document in the above matter by mailing a copy thereof, first class postage prepaid, to:

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Date: November 10, 1998